



# **THE INDEX**

## **OF THE**

# **RANGOON LAW REPORTS**

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**(1946) Rangoon**

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Containing cases determined by the High Court of Judicature at Rangoon and by the Judicial Committee of the Privy Council on appeal from that Court.

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ဦးကျော်မြင့်။

U KYAW MYINT,

BARRISTER-AT-LAW.

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# RANGOON LAW REPORTS

## SPECIAL BENCH (APPELLATE CRIMINAL).

*Before Sir Herbert Dunkley, Acting Chief Justice, Mr. Justice Ba U,  
and Mr. Justice Mootham.*

THE KING (APPLICANT)

v.

MAUNG HMIN AND THREE (RESPONDENTS).\*

1946

Mar. II.

*International Law—Hague Regulations—How far part of Municipal Law—Rights and duties of occupant Government—Occupation Courts—Validity of conviction and sentence passed during Japanese occupation—How far binding on Court of legitimate Government on reoccupation—Code of Criminal Procedure, s. 403—Occupation Court whether Court of competent jurisdiction.*

Six persons including the present respondents were implicated in a dacoity with murder. One of them was conditionally pardoned and became an approver and the other five were tried by a Court of Session during the Japanese occupation. All the accused persons were convicted but on appeal by four to the Supreme Court, two of them were acquitted, and the sentences of the other two were reduced. These convicted persons regained liberty when the Japanese were retreating. After British occupation the respondents were arrested and the Court of Session upheld the plea of *autrefois convict* put forward by the accused. On revision by the Crown:

*Held*: International Law has no validity in British Courts, except in so far as its principles are accepted and adopted by the Municipal Law. Hague Regulations will be treated as incorporated into the Municipal Law of Burma in so far as they are not inconsistent with the ordinary Law of the country.

Occupant Governments have the duty of restoring and maintaining public order and safety by means of the ordinary law of the occupied country.

If Courts are constituted according to the Municipal Law of the occupied country, they are validly constituted Courts. If these courts administer the Municipal Law of the occupied Country, their decisions are valid and binding on the lawful Government and its Courts.

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\* Criminal Revision No. 1 (A) of 1946 against the order of Special Judge of Tharrawaddy in Trial No. 10 of 1945, dated the 12th December 1945.



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 v.  
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 AND THREE. Hague Regulations; Wheaton's Elements of International Law, Vol. II, page 791; Hall's International Law, Part III, Chap. V, Art. 163; McNair's Legal Effects of War, page 321-322; *The West Rand Central Gold Mining Company v. The King*, (1905) 2 K.B. 391, 406; *Chung Chi Cheung v. The King*, (1939) A.C. 160, 167, followed.

*Held*: The order of the Japanese Commander-in-Chief continued the old Courts and the old law of Burma.

The so-called Independent Government of Burma, having been brought into existence during the War before the conclusion of peace or the signing of a treaty, had no legal status and new laws passed by them should be regarded as laws passed by the occupying power.

*Held further*: Competent Court in s. 403 of Criminal Procedure Code is a Court which has legal authority to decide a case. Legal authority means authority under the laws of Burma. Occupation courts having been established under the Municipal Law of Burma, their judgments are valid and binding on the lawful Government. The Sessions Court of Tharrawaddy during occupation was a competent Court within the meaning of s. 403 (1) of the Criminal Procedure Code.

*Per DUNKLEY, A.C.J.*—The decision regarding the legal status of ordinary Courts during occupation does not imply any decision regarding the status of the Supreme Court or the City Court established by the Japanese administration.

*Per BA U, J.*—(*Seemle*) An occupying power while occupation lasts is for all practical purposes the *de facto* Government, and its acts, legislative, executive or judicial, consistent with the terms of Art. 43 of the Hague Regulations will be recognized by the legal Government.

*Bank of Ethiopia v. National Bank of Egypt and Liguori*, (1937) 1 Ch.D. 513, 522, referred to.

*Per MOOTHAM, J.*—S. 403 embodies in statutory form the common law principle that a man may not be put twice in jeopardy for the same offence under the common law.

*E Maung* (Advocate-General) for the Crown.

The Court should invoke the doctrines of International law only when legitimate occasion arises otherwise rules of Municipal law will prevail. *Reg v. Keyn*, (1876) L.R. 2 Ex.D. 63 at pp. 202, 203; *In re Queensland Mercantile Agency Company*, (1892) 1 Ch. 219; *The West Rand Central Gold Mining Company v. The King*, (1905) 2 K.B. 391; *The Zamora*, (1916) 2 A.C. 77; and *Chung Chi Cheung v. The King*, (1939) A.C. 160.

The leading case on the subject is (1905) 2 K.B. 391 at p. 401, *et seq.* Applying the tests laid down there, it is not possible to say:

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First: There is no uniformity of practice on the nature of occupation Courts; the Duke of Wellington's pronouncements are classic and unchallenged. During 1914 to 1918 the practice of the occupying forces was not uniform. The Belgians accepted some and rejected others of the decisions of occupation Courts. There is no principle on this. A reference to the Orders in Council after the various Treaty of Peace Acts and to Section 5 of the Indemnity Act, 1920 (British) of the war of 1914—18 clearly shows that the Parliament did not accept the position as to binding nature of decisions of occupation Courts.

Secondly: Text writers, too, do not speak in one voice. See Wheaton's International Law, p. 529; Hall's International Law, p. 579; McNair Legal Effects of War (1944 Edn.), pp. 336—352, say that adjudications of occupation Courts are binding on the lawful Government. Articles 23 (4) and 43 of the Hague Convention 1907 are cited in support. McNair finds additional authority in (1819) 4 Wheaton 246, a decision of the U.S. Supreme Court. This decision is contrary to *Lodewyk Johannes de Jager v. The Attorney-General of Natal*, (1907) A.C. 326, a decision of the Privy Council. Oppenheim II, article 169, states the rule in the contrary sense.

The Hague Convention 1907 was not embodied in any Act. Though the view in the U.S. is different, *Walker v. Baird and another*, (1892) A.C. 491 and *The Zamora*, (1916) A.C. 77 say that such conventions are not binding on Courts in the Empire. The articles 23 (4) and 43 of the Hague Convention are very slight foundation for making

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an edifice giving decisions of occupation Courts as sacred. The decision in *Porter v. Freudenberg*, (1915) 1 K.B. 875 takes the right view of Article 23 (4) *Bank of Ethiopia v. National Bank of Egypt and Liguori*, (1937) 1 Ch.D. 513 and *Banco de Bilbao v. Sancha*, (1938) 2 K.B. 176 and *Haile Selassie v. Cable and Wireless, Limited*, (1939) Ch. 182 do not support the view that occupying forces can set up Courts and bind the lawful Government. The only effect of these decisions is to recognize as effective Government, the administration recognized by the Foreign Office.

Article 43 enunciates the duty to insure peace and order. There is a corresponding duty. Occupation Courts are there of necessity, like Courts Martial. *Clifford and O'Sullivan*, (1921) 2 A.C. 570. Compare Indemnity and Validating Act 1945 in relations to Courts set up by British Military Administration in Burma.

If a person is imprisoned by Occupation Courts sentence and the validity was raised by the injured person under section 491 Criminal Procedure Code, there would be a final decision. The right of a British subject to be tried by a duly constituted authority in accordance with the law of the land cannot be taken away by implication.

My last submission is this. Where lawfully constituted Courts are functioning, the occupying power must permit them to continue under International law. That is the machinery for maintaining peace and order. But the ultimate sanction is that they are the original courts and hence their decision is binding on the lawful government. If there are no such courts the occupying power establishes them to keep law and order; and the power exercised must be limited by the purpose of creating them and



limited to the duration of occupation. The argument based on inconvenience has nothing to do with courts of law. That is for the legislature.

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*Kyaw Myint* for the respondents.

DUNKLEY, A.C.J.—This revision application, made by the Deputy Commissioner of Tharrawaddy, raises directly the important question of the validity of convictions had and sentences passed by Criminal Courts during the Japanese occupation of Burma. In Sessions Trial No. 41 of 1944 of the Sessions Court of Tharrawaddy, three of the present respondents, together with two other persons who are now absconding, were tried and convicted by the learned Sessions Judge of the offence of dacoity with murder, under section 396 of the Penal Code. Two of them were sentenced to death and one to transportation for life. The two absconding persons were sentenced to terms of rigorous imprisonment. The remaining respondent, Tha Aye, was granted a conditional pardon and was examined as an approver, and at the end of the trial was released as he had complied with the conditions of his pardon. There was an appeal to the Supreme Court at Rangoon by four of the convicted persons, with the result that two of them, Maung Nyun and Gwa To, were acquitted, and the sentences of death passed on two others were reduced to transportation for life. All these proceedings took place during the period of the Japanese occupation of Burma. The convicted persons were confined in the jail at Tharrawaddy to undergo their sentences, but in May, 1945, when the Japanese were retreating from Burma, these persons, together with the other persons confined in the jail, regained their liberty.

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Subsequently the respondents were arrested by the British authorities and were sent up for trial before the Special Judge of Tharrawaddy for the same offence as that for which they had been convicted, or pardoned, in Sessions Trial No. 41 of 1944 of the Sessions Court of Tharrawaddy, and on the same facts. The learned Special Judge, in a clear and well-reasoned judgment, has held that the plea of *autrefois convict* (or *acquit*, as the case may be) which was raised by the defence at the trial is a valid and complete defence to this second trial and has discharged the respondents. This application in revision is brought before this Court against this order of discharge.

The right decision of this application depends upon the true construction of sub-section (1) of section 403 of the Code of Criminal Procedure. So far as it is relevant to the present application, this sub-section reads as follows :

"A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence."

The contention advanced on behalf of the Crown is that the Courts which functioned in Burma during the Japanese occupation, to which I shall subsequently refer as "occupation Courts", were not "Courts of competent jurisdiction" and that the judgments and orders of these Courts ceased to have any effect on the enemy occupation coming to an end. The second limb of this contention is involved in the first, for if the occupation Courts were competent Courts their judgments and orders still remain in force. Now, a Court of competent



jurisdiction is a Court which has legal authority to determine on the merits the case which is brought before it. "Legal authority" means, of course, authority under the law of Burma. Hence, the question which falls for decision is whether the occupation Courts should be recognized as Courts validly and lawfully constituted under the law of Burma.

Annexed to the International Convention concerning the Laws and Customs of War on land, which was signed at the Hague on the 18th October, 1907, and which was ratified by both Great Britain and Japan, are certain regulations, commonly known as The Hague Regulations. Article 43 of these regulations, which is the important article for the present purpose, reads as follows :

"The authority of the power of the State having passed *de facto* into the hands of the occupant, the latter shall do all in his power to restore, and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country."

By this article two duties are cast on the occupant enemy, (1) to restore and ensure public order and safety, and (2) to do so in accordance with and by means of the ordinary law of the occupied country. If the enemy respects the provisions of this article, and to the best of his ability restores and maintains public order and safety in the occupied territory, and does so by enforcing the ordinary law of the occupied territory, how can it be possible for the lawful government, on re-occupation of the territory, to treat as null and void the judgments and orders of the Courts which have administered that law during the absence of the lawful government? Such action would render article 43 meaningless and purposeless, and would lead to complete chaos.

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This article has been commented on at length by learned authors of works on International Law. In the Manual of Military Law issued by the War Office, Chapter XIV, the following occurs (article 364) :

"Therefore the civil and penal laws of the occupied country continue as a rule to be valid, the Courts which administer them are permitted to sit, and all crimes of the inhabitants not of a military nature or not affecting the safety of the army are left to their jurisdiction."

And again (article 368) :

"The ordinary Courts of justice and the laws they administer should be suspended only when the refusal of the judges and magistrates to act or the behaviour of the inhabitants makes it necessary. In such case the occupant must establish Courts of his own and make this measure known to the inhabitants."

In Wheaton's Elements of International Law (sixth edition, volume II, page 791) the following commentary on this article appears :

"In recent wars the occupying commander has usually retained the services of the local judges and functionaries (other than political officials) for the general and judicial and administrative work of the locality. But he is not obliged to do so. The practice facilitates the maintenance of the laws prevailing there, especially the civil and criminal jurisprudence. These laws ought not to be interfered with unless they are contrary to the martial law enforced, which, of course, will be considered by the occupant to be predominant."

In general the acts of the occupant possess legal validity, and under international law should not be abrogated by the subsequent government."

In Hall's Treatise on International Law, eighth edition, Part III, Chapter V, article 163, the following passage occurs :

"As a general rule the right of postliminium goes no further than to revive the exercise of rights from the



moment at which it comes into operation. It does not, except in a very few cases, wipe out the effects of acts done by an invader, which for one reason or another it is within his competence to do. Thus judicial acts done under his control when they are not of a political complexion, administrative acts so done, to the extent that they take effect during the continuance of his control, and the various acts done during the same time by private persons under the sanction of the municipal law, remain good. Were it otherwise, the whole social life of a community would be paralysed by an invasion; and as between the state and individuals the evil would be scarcely less,—it would be hard for example that payment of taxes made under duress should be ignored, and it would be contrary to the general interest that sentences passed upon criminals should be annulled by the disappearance of the intrusive government."

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The last sentence is pertinent to the matter which is now before us.

Sir Arnold McNair in his treatise on "Legal Effects of War" (second edition, page 321) says:

"In so far as the occupant acts within the scope of the authority permitted to him by international law, it is customary for the legitimate government, if and when it reacquires possession of the territory, to recognize his measures and give effect to rights (and equally to penalties) acquired thereunder."

On the other hand, Oppenheim (International Law, sixth edition, volume II, article 280) says:

"Whether the former laws of a reconquered State revive *ipso facto* by the reconquest; whether sentences passed on criminals during occupation by the enemy should be annulled; these, and many similar questions treated in books on International Law, have nothing at all to do with International Law, but have to be determined exclusively by the municipal law of the respective States."

This passage is the sheet-anchor of the learned Advocate-General's argument. I am not disposed, and if I were I should scarcely have the temerity, to differ from the opinion of such an eminent

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authority as Professor Oppenheim, but the matter does not end there. There is no sharp dividing line between international law and municipal law, and of necessity some of the principles of international law have to be and are incorporated in and form part of the municipal law. McNair (page 322) puts the matter thus :

"It is a long time since any British territory was under enemy occupation, though this happened for a short time in the South African war, and we are not aware of English judicial authority in the matter. It is suggested, however, that since the principles stated above have received general recognition and our Courts apply the generally recognized rules of customary international law except in so far as Great Britain has dissented from them, and since, moreover Great Britain has ratified the Hague Regulations, the principles stated above would in all probability be adopted by our Courts."

In the *West Rand Central Gold Mining Company, Limited v. The King* (1) Lord Alverstone C.J. said this :

"The second proposition urged by Lord Robert Cecil, that international law forms part of the law of England, requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognized and acted upon by our own country, or that is of such a nature, and has been so widely and generally

(1) (1905) L.R. 2 K.B. 391 at 406.



accepted, that it can hardly be supposed that any civilized State would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognized, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations."

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In delivering the judgment of their Lordship of the Privy Council in *Chung Chi Cheung v. The King* (1) Lord Atkin said :

"It must be always remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals."

It therefore follows that the Hague Regulations must be treated by the Courts of Burma as incorporated into the municipal law of Burma, to such extent as they are not inconsistent with the ordinary law of the country. Now, it has been shown that article 43 of the Hague Regulations lays on the enemy occupant the duty of restoring and maintaining public order and safety in accordance with and by means of the ordinary law of the occupied country. For this purpose, the occupant must obviously establish and maintain Courts of justice, and so long as those Courts are constituted in accordance with the municipal law of the occupied country they are validly constituted Courts, and

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(1) (1939) L.R.A.C. 160. at 167.

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if the law administered by those Courts is the municipal law of the occupied country their decisions are valid and binding on the lawful government and the inhabitants of the country, and should be given effect to. On the other hand, if the enemy occupant sets up Courts of his own which are not constituted in accordance with the ordinary law of the occupied country and do not administer that law, such Courts have no legal status and their decisions are null and void.

The Courts which administered criminal justice in Burma during the Japanese occupation were Courts constituted under the Code of Criminal Procedure. The presiding Judges and Magistrates were, for the most part, the same judicial officers who presided over these Courts under the British administration. The penal laws were the same; the British Penal Code continued to define and punish offences, and the British Code of Criminal Procedure continued to govern the procedure of the criminal Courts. No changes of any importance were made.

We have been fortunate in that the learned Advocate-General has produced for our inspection (a copy of it is filed on this record) an original copy in English of the order of the Japanese Commander-in-Chief regulating the Courts of Burma. It is styled "Military Ordinance No. 6", and is dated the 7th July, 1942. The language in which the order is framed is somewhat unusual. The preamble reads as follows:

"Whereas judiciary is essential for preservation of the right and enforcement of duty of the people and also for keeping public peace and order."

It shows that the Commander-in-Chief had in mind the terms of article 43 of the Hague Regulations.



Paragraph 1 states :

I, the Commander-in-Chief of the Nippon Imperial Army establish courts and appoint public prosecutors, and conduct and control the business of public prosecution, and I provide for and conduct judicial administration in Burma.

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Paragraph 2 states :

The constitution and jurisdiction of the Courts and the function of public prosecutors shall, for the time being, be the same as existed in Burma previously, except otherwise provided by this or any other ordinance, expressly or by implication.

Paragraph 3 excepts from the jurisdiction of these Courts military offences and cases in which Japanese subjects were concerned. Paragraph 4 states :

Unless otherwise provided in this or by any ordinance, regulation, etc., the law that shall be administered in the courts, hereby constituted, shall, for the present, be essentially the same as was being administered in Burma before the commencement of this ordinance."

It has been suggested in argument that by this order the Japanese Commander-in-Chief constituted entirely new Courts, but the order does not bear this interpretation. The plain meaning of its language is that the Japanese Commander-in-Chief continued in force the old Courts and the old law. To my mind, no other interpretation of the language of this order is possible. So far as we are aware, no alteration or amendment of these provisions of this order was made during enemy occupation. Hence the Courts constituted under the municipal law of Burma continued to function, and the law administered by these Courts continued to be the

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municipal law of Burma. The learned Advocate-General has argued that the Courts during the Japanese occupation were not Courts constituted under the law of Burma because the Japanese authorities made some changes in the presiding Judges or Magistrates. He pointed out that under section 110 of the Government of Burma Act District and Sessions Judges have to be appointed by the Governor, and under section 12 of the Code of Criminal Procedure Magistrates are appointed by the Governor. As regards the latter part of this contention, I would invite attention to section 40 of the Code of Criminal Procedure, but generally I think this argument involves a confusion between personalities and Courts. The Courts were the Courts established under section 6 of the Code of Criminal Procedure, and although the presiding Judges and Magistrates may not have been appointed strictly in accordance with the provisions of that Code the latter consideration appears to me to be irrelevant. The occupying power has cast upon it the duty of maintaining public order and safety, and therefore of maintaining Courts of justice for this purpose. Surely the occupying power must have the necessary powers to enable it to perform this duty; the appointment of presiding officers for these Courts is an ancillary power which the occupant must be able to exercise in order to enable him to carry out his duty. If that were not so, an absurd situation would arise. The decisions of Courts which continued to be presided over by the same Judges or Magistrates who presided over them prior to enemy occupation would be recognized as valid and binding, whereas the decisions of other exactly similar Courts which were presided over by Judges or Magistrates appointed thereto after enemy



occupation would be null and void. We have also been referred to Act No. 16 of 1944 of the so-called Independent Government of Burma. The so-called Independent Government of Burma had, of course, no legal status whatever, and the statutes passed by that Government are of no legal effect, but so far as they were brought into operation during the period of enemy occupation they must be considered as new laws made by the occupying power. Now this Act abolished committal proceedings and authorized a Court of Session to take cognizance of offences without commitment. It is urged that this constituted a radical alteration of the law, as laid down in section 193 of the Code of Criminal Procedure, which the occupying power was not authorized to make, but this is not so. Subsection (1) of section 193 of the Code of Criminal Procedure enacts that, except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a magistrate duly empowered in that behalf. Section 193 (1) gave authority to the occupying power to pass a law doing away with the necessity for committal proceedings, and such a law was passed. In passing that law, the occupying power did not exceed its authority, and this change in procedure did not amount to the establishment of new Courts.

In no sense were the occupation Courts any other than Courts established under the municipal law of Burma, and they administered the municipal law of Burma. The particular case with which we are now dealing was tried by the Sessions Court of Tharrawaddy which, by reason of Act No. 16 of

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1944, took cognizance of the offence as a Court of original jurisdiction without commitment. This Court had always existed under the British administration. The Judge who presided at that time over the Court, although he was not in charge of this Court when the occupation by the enemy took place, had been a Sessions Judge under the British administration. The judgment of the Court is valid and binding on the lawful Government and the persons affected thereby, and should be carried into effect. Hence the conclusion is that in trial No. 41 of 1944 of the Court of Session, Tharrawaddy, that Court was a Court of competent jurisdiction, within the meaning of section 403 (1) of the Code of Criminal Procedure, and the respondents cannot be tried again for the same offence. The pardon granted in connection with that trial to the respondent Tha Aye is a valid and subsisting pardon and must be honoured. This application in revision is dismissed.

This disposes of the matter before us, and, in my view, anything that might be said in this case regarding the status of the Supreme Court at Rangoon and the Rangoon City Court, two Courts created by the occupying power, would be merely *obiter dicta*. I therefore refrain from expressing any opinion regarding the validity of the decisions of these Courts.

I think perhaps we ought to give some guidance to the executive authorities as to how the conclusions arrived at in our judgments should be carried into effect. In respect of all cases tried by the occupation Courts (with the possible exception of the Rangoon City Court), which ended in a conviction and sentence, where it is possible to prove (1) the identity of the person convicted,



(2) the offence of which he was found guilty, and (3) the sentence which was passed upon him, if the convicted person has not yet completely served that sentence he may be committed to prison to serve the unexpired portion of his sentence. Such committal to prison will be an executive act. The judicial remedy of a person so committed to prison will be by means of a petition to this Court, to be dealt with under sections 491 and 561A of the Code of Criminal Procedure.

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BA U, J.—I have had the advantage of reading the judgment of my Lord, the Acting Chief Justice and that of my Brother, Mootham J. As I find myself in entire agreement with their views on most of the points involved in the case, I do not propose to say much.

According to Article 43 of the Hague Regulations, it is the duty of an occupying Power to re-establish and ensure public order and safety in substantial compliance with the laws in force of the occupied country. So long as it does it, its acts, whether legislative, executive, or judicial, will be treated as valid by the legitimate Government on regaining possession of its territory. All eminent writers on international law agree on this point. McNair in his book, "Legal Effects of War", second edition, at page 337, says :

"Whether the territory under occupation is British or belongs to a co-belligerent with Great Britain or Great Britain is neutral, the principle is that, the occupant being under a duty to maintain order and to provide for the preservation of the rights of the inhabitants and having a right recognized by international law to impose such regulations and make such changes as may be necessary to secure the safety of his forces and the realization of the legitimate purpose of his occupation, his acts, whether legislative,

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executive, or judicial, so long as he does not overstep those limits will be recognized by the British Government and by British Courts of law—during and after the war if Great Britain is neutral, after it if Great Britain is belligerent.”

I may also refer to the observations of Clauson J., made in the case of *Bank of Ethiopia v. National Bank of Egypt and Liguori* (1). The facts of that case are entirely different from the facts of the present case and the point for decision in that case is also different from the point for decision in this case, but in my opinion the principle deducible from the observations of Clauson J. is quite opposite to the point in issue in the present case. Clauson J. observed :

“ It was then sought, as I understood, to argue that the recognition of some measure of sovereignty *de jure* in the fugitive Emperor logically led to the denial of full sovereignty to the *de facto* government ; and it was, as I understood, suggested that there existed this limitation on the acts of the *de facto* government which are to be recognized as internationally valid, that they must be acts which are strictly necessary for preserving peace, order and good government within the area controlled by the *de facto* government : This seems to me to be entirely inconsistent with the authorities to which I have already referred, and in principle to be fallacious. The recognition of the fugitive Emperor as a *de jure* monarch appears to me to mean nothing but this, that while the recognized *de facto* government must for all practical purposes, while continuing to occupy its *de facto* position, be treated as a duly recognized foreign sovereign state, His Majesty's government recognizes that the *de jure* monarch has some right (not in fact at the moment enforceable) to reclaim the governmental control of which he has in fact been deprived.”

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(1) (1937) 1 Ch.D. 513 at 522.



The principle that I deduce from these observations is that British Courts of law will accord due recognition to the acts of a *de facto* government, legislative, executive or judicial, in an area under its control. Now, an occupying Power, while the occupation lasts, is for all practical purposes a *de facto* government and its acts, legislative, executive or judicial, consistent with the terms of article 43 of the Hague Regulations, will be recognized as valid by the legitimate government on regaining possession of its territory. This is, in my opinion, in full accord with the views expressed by McNair.

Now, what did the Japanese Commander-in-Chief do? By an Ordinance (Military Ordinance No. 6) dated the 7th July, 1942, he re-established all the Courts from the highest to the lowest that were in existence in Burma at the time of the outbreak of the war. Most of the judges and magistrates who presided over those Courts were the same judges and magistrates as were appointed by the British Government. Only in place of those who had died or who could not be found or who had refused to serve or who could not be re-appointed for some reason, new magistrates and judges were appointed. The laws which they administered were the same as were in force at the time of the outbreak of the war. Only in the case of the High Court, a slight change was made. The ordinary civil and criminal original jurisdiction of the High Court was transferred to a new Court called the City Court and the name of the High Court was later changed to that of the Supreme Court. The appellate jurisdiction of the High Court remained the same as before. Two of the four Judges of the Supreme Court were two of His Majesty's Judges who could not evacuate to

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India. Only the other two were new Judges who were appointed by the Japanese Commander-in-Chief in place of those who had evacuated to India. The laws and procedure followed by the Supreme Court were the same as was followed by the High Court in exercise of its Appellate Side jurisdiction. Therefore I am of opinion that the Courts that functioned during the time of the Japanese occupation were Courts of competent jurisdiction within the meaning of section 403 of the Code of Criminal Procedure and, consequently, no interference is called for with the order of the Sessions Judge.

MOOTHAM, J.—It is unnecessary for me to restate the facts which give rise to this application in revision, but it is, I think, important to observe that the learned Special Judge has upheld the plea of *autrefois convict* as regards the respondents San Phu and Maung Hmin and the plea of *autrefois acquit* in the case of the respondent Gwa To. The order which in the opinion of the learned Special Judge sustained the pleas in bar set up by the respondents was accordingly not that of the original trial court, but that of the Supreme Court on appeal.

Section 403 of the Code of Criminal Procedure, so far as it is material, provides that

"A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence."

What then is a Court of competent jurisdiction? The Advocate-General has contended that a Court can only be one of competent jurisdiction within the meaning of section 403 if it derives its authority from the Crown. In my opinion, with respect, this



is to place too narrow a construction upon the section. I think that section 403 embodies in statutory form the common law principle that a man may not be put twice in jeopardy for the same offence; and under the common law it is no answer to a plea of *autrefois acquit* that the acquittal was by the Court of a foreign country:

*Hutchinson's* case, referred to in *Beak v. Thyrrwhit* (1); *R. V. Roche* (2) and see *R. V. Aughet* (3).

A court of competent jurisdiction within the meaning of section 403 of the Code of Criminal Procedure may, I think, be defined as a court which has authority under the law of Burma to determine cases brought before it. In delivering the judgment of the Board in *Chung Chi Cheung v. The King* (4), Lord Atkin said:

"It must be always remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals."

It therefore follows that a rule of international law which is not inconsistent with the ordinary law of Burma will be recognized and applied by the courts of this country as part of that law.

(1) (1687) 3 Mod. 194.

(2) (1775) 1 Leach 134.

(3) (1918) 118 L.T. 658.

(4) (1939) A.C. 160, 167.

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Article 43 of the Annexure to the International Convention concerning the Laws and Customs of War on Land, which was ratified by both Great Britain and Japan, subject in the case of the latter power to a reservation which is not here material, is in the following terms :

"The authority and the power of the State, having passed *de facto* into the hands of the occupant, the latter shall do all in his power to restore, and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country."

This article imposes upon the occupying power the duty of taking such measures as are necessary to restore and maintain public order, employing for this purpose, so far as it is possible to do so, the ordinary law of the country of which it is in occupation. The object of the Article, as I understand it, is to prescribe a rule of conduct for an invader which, while not hampering him in the carrying out of any legitimate operation of war, will, as far as possible, alleviate the consequences of the inevitable disruption of ordinary life caused by the occupation. This object will however be but partially achieved if the Government of the invaded State on its return refuses to recognize as valid acts of the invader done by him under the authority of Article 43. The effect of such a refusal would be to cause much unnecessary confusion and distress ;

"the whole social life of a community would be paralysed by an invasion ; and as between the state and individuals the evil would be scarcely less,—it would be hard for example that payment of taxes made under duress should be ignored, and it would be contrary to the



general interest that sentences passed upon criminals should be annulled by the disappearance of the intrusive government

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(Hall, International Law, eighth edition, at page 579.) The evil consequences which would flow from a refusal to accord recognition to the legitimate acts of an occupying power is in itself, in my opinion, a strong argument in favour of recognizing such acts as being of continuing validity. As to the desirability of recognition there would indeed appear to be no doubt, but is there a rule of international law which enjoins it? In the circumstances in which this Court is now sitting recourse to original authorities is difficult, and I think it is permissible to refer to the opinion of leading writers on international law, not on the question of what the law ought to be but on what it in fact is.

Thus Wheaton (Elements of International Law, volume II, page 791) says :

"In general the acts of the occupant possess legal validity, and under international law should not be abrogated by the subsequent government."

Hall (International Law, eighth edition, at page 579) says :

"As a general rule the right of postliminium goes no further than to revive the exercise of rights from the moment at which it comes into operation. It does not, except in a very few cases, wipe out the effects of acts done by an invader, which for one reason or another it is within his competence to do. Thus judicial acts done under his control, when they are not of a political complexion, administrative acts so done, to the extent that they take effect during the continuance of his control, and the various acts done during the same time by private persons under the sanction of municipal law, remain good."

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The same appears to be the view of Oppenheim (International Law, sixth edition), who in section 282 of volume II, says

"Indeed, the State into whose possession such territory has reverted must recognize these legitimate acts, and the former occupant has by International Law a right to demand this. Therefore, if the occupant has collected the ordinary taxes, has sold the ordinary fruits of immovable property, has disposed of such movable State property as he was competent to appropriate, or has performed other acts in conformity with the laws of war, this may not be ignored by the legitimate sovereign after he has again taken possession of the territory. However, this only extends to acts done by or under the authority of the occupant *during the occupation.*"

Sir Arnold McNair, who was formerly Whewall Professor of International Law at Cambridge, and now British member of the International Court of Justice in his "Legal Effects of War", second edition, at page 321, after quoting article 43 of the Annexure to the Hague Convention, says :

"In so far as the occupant acts within the scope of the authority permitted to him by international law, it is customary for the legitimate government, if and when it reacquires possession of the territory, to recognize his measures and give effect to rights acquired thereunder",

and the learned author cites as illustrative of this general proposition a decision of the German-Belgian Mixed Arbitral Tribunal in 1925 in *City of Antwerp v. Germany*, and of the Brussels Court of Appeal in *City of Malines v. Société Centrale pour l'Exposition deGaz* ; and at page 339 he refers to the decision of Story J. in the American case of *United States v. Rice* (1) in which it was held that import duties paid to the British Government

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(1) (1819) 4 Wheaton 246.



while in military occupation of the American State of Main in 1814-15 could not be claimed again by the American Government after the occupation had ceased. Sir Arnold McNair summarizes his opinion at page 338 where he says :

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"Thus we apprehend that if the enemy were to occupy the Scilly Isles (we refrain from instancing the Channel Islands because they have their own legal systems), all the ordinary transactions of private law taking place in accordance with existing English law during the enemy administration, such as contracts, dispositions of movables and immovables, devolution of property by will or upon intestacy, and all normal official transactions such as the collection of ordinary taxes, would, at the end of the occupation, be treated as valid, and all judgments, civil and criminal, given in accordance with English law or with such regulations as the enemy was lawfully entitled to prescribe, would be respected."

I think that it may safely be held that there exists a rule of international law which requires the legitimate government on regaining possession of territory occupied by its enemy to treat as valid acts of the latter done within the scope of the authority given by article 43 of the Hague Regulations. The one rule is indeed the corollary of the other.

I have no doubt that when the statute law is in conflict with international law this Court is bound by the former; but there is in my opinion no conflict between the provisions of section 403 of the Code of Criminal Procedure and either article 43 of the Hague Regulations or the rule according recognition to acts properly performed under that Article. In order to perform the duty imposed on it by article 43 Japan was bound to establish courts in occupied Burma, and provided

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such courts were constituted in accordance with the law of Burma and administered that law then in my judgment those courts were courts of competent jurisdiction.

Now what courts were established by the Japanese in Burma and what law did they administer? It appears that the British withdrawal from Burma in the early months of 1942 was followed by a period during which no courts functioned and it was necessary therefore for the Japanese invader to take steps to re-establish courts. On the 7th July 1942, the Commander-in-Chief of the Nippon Imperial Army in Burma issued an Ordinance (Military Ordinance No. 6) entitled "An Ordinance providing for the time being a Machinery for Judicial Administration in Burma under the Nippon Military Government." The relevant portions of this Ordinance, which was published in English, are as follows :

" WHEREAS judiciary is essential for preservation of the right and enforcement of duty of the people and also for keeping public peace and order, I, the Commander-in-Chief of the Nippon Imperial Army in Burma, do hereby ordain, upon full consideration of the present circumstances in Burma as follows :

1. I the Commander-in-Chief of the Nippon Imperial Army establish courts and appoint public prosecutors, and conduct and control the business of public prosecution ; and I provide for and conduct judicial administration in Burma.
2. The constitution and jurisdiction of the courts and the function of public prosecutors shall, for the time being, be the same as existed in Burma previously ; except otherwise provided by this or any other ordinance, expressly or by implication:

\* \* \* \*

4. Unless otherwise provided in this or by any ordinance, regulation, etc., the law that shall be administered in the courts, hereby constituted,



shall, for the present, be essentially the same as was being administered in Burma before the commencement of this ordinance ;

Provided that any law which is contrary to the spirit for the establishment of the new order in Great East Asia, 'as is the aim and object of the Nippon Military Government, shall not apply.'

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6. (1) I ordain establish the High Court in Rangoon.

(2) The said court referred to in sub-section (1) shall have, for the present, the appellate jurisdiction formerly exercised by the High Court of Judicature at Rangoon."

The purpose and effect of article 2 of this Ordinance was, in my opinion, to re-establish the courts which were formerly functioning in Burma and to ensure that the constitution and jurisdiction of those courts, unless other provision is made, remained unchanged. *Prima facie* therefore the Sessions Court of Tharrawaddy exercised the same jurisdiction and, under article 4, administered the same laws as in former times. The Advocate-General has drawn our attention to Act No. 16 of 1944 of the so-called Independent Government of Burma, the effect of which was to abolish committal proceedings. The "Independent Government of Burma" had of course no legal status, and its subordination to the occupying power has not been disputed. The amending Act must in consequence be regarded as an act of the occupying power, and an alteration in procedure of a nature which was almost certainly rendered necessary by the changed conditions in which trials were held cannot, I think, be regarded as a misuse by the occupying power of its legislative authority or affect the legal status of the courts. It may be observed in passing that prior to the date upon which Act

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No. 16 came into force (the 12th January, 1944), the Government of Burma had itself, by the Special Judges Act, 1943, abolished committal proceedings in the case of persons tried by judges appointed under that Act. The question of the competency of the Sessions Court of Tharrawaddy cannot, in my opinion, be considered as a matter distinct and separate from that of the High (or Supreme) Court, if only for the reason that under section 374 of the Code of Criminal Procedure all sentences of death passed by a Sessions Court still required to be confirmed by the High Court before being executed. Reference is made in article 6 of the Military Ordinance No. 6 to the High Court. The name of this court was subsequently altered but the change is, I think, immaterial. Specific reference was, it appears to me, made to the High Court in the Ordinance, not because the court was intended to be a new court of purely Japanese creation, but as a matter of convenience, the jurisdiction of the court having been diminished by the transfer of the original jurisdiction to another court. The High Court was converted into a purely appellate court, and clause (2) of article 6 made it clear that the appellate jurisdiction which it exercised was the appellate jurisdiction formerly exercised by the High Court of Judicature. In effect the High Court of Judicature continued to function on its appellate side. Just as prior to the British withdrawal the Sessions Courts were subordinate to and subject to the general supervision of the High Court, so during the period of occupation the Sessions Courts were subordinate to and subject to the supervision of the High (or Supreme) Court, and, as I have already mentioned, sentences of death passed by a Sessions Court still required the confirmation by the High (or Supreme) Court.



It will be observed that Military Ordinance No. 6 does not refer to the appointment of judges and magistrates; but in practice the courts established under the Ordinance were in most cases presided over by judicial officers who had been judges or magistrates under the former administration. In my opinion, the action taken by the Japanese authorities in re-establishing the courts which formerly existed in Burma, and in providing that the law they were to administer was (until altered) to be essentially the same as that previously in force, was strictly in accordance with the provisions of international law as embodied in article 43 of the Hague Regulations. Both courts were constituted in accordance with the law of Burma, both administered the law of Burma. The fact that the Judge of the Sessions Court, although a Sessions Judge prior to the withdrawal, had not been placed by the Government of Burma in charge of the Tharrawaddy Sessions Division, or that one or more of the Judges of the Supreme Court had not previously held judicial office appears to me not to be material, for obviously an occupying power would be unable to perform its obligations under the Hague Convention if it were not able to post judicial officers where their services were most required or to appoint judges and magistrates in the place of others who were unable or unwilling to continue in the exercise of their duties.

It follows that this court should recognize the judgments and orders of those courts as being of continuing validity, and in my view, therefore, both the Sessions Court of Tharrawaddy and the Supreme Court were courts of competent jurisdiction within the meaning of section 403 of the Code of Criminal Procedure.

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The further question which arises is whether the learned Special Judge was right in discharging the fourth respondent, Tha Aye, on the ground that he had been tendered a pardon in the Sessions Court of Tharrawaddy and the Public Prosecutor had not certified that the conditions on which the tender was made had not been complied with. Tha Aye was tendered a pardon in Criminal Miscellaneous Proceedings No. 39 of 1944 of the Sessions Court of Tharrawaddy. He gave evidence against his co-accused in Sessions Trial No. 41 of 1944 of that Court, and at the conclusion of the trial he was released. In my opinion the act of the Sessions Court in tendering a pardon to Tha Aye in accordance with the provisions of section 338 of the Code, was an act the validity of which must be respected, and that the order of discharge was right.

I agree, therefore, that the learned Special Judge's order was correct and that this application must be dismissed.

## PRIVY COUNCIL.

A.V. &amp; SON AND ANOTHER (APPELLANTS)

v.

AKOOJEE JADWET &amp; CO. (RESPONDENTS).

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Nov. 11.

[On appeal from the High Court at Rangoon.]

*Option, of renewal on mutual agreement in an agreement of agency—Concluded contract on all terms necessary—Agreement on some points with provision for execution of an agreement, not concluded contract—Distinction between negotiation and contract—Supply of goods in expectation of an agreement not conclusive of existence of agreement.*

A.K.J. acted as sub-agents of I.B.P. Co., Ltd. A.V. was the sole distributor in Moulmein under A.K.J. on an agreement that A.V. will pay A.K.J. an overriding commission of Rs. 15 for each wagon of petrol sold, and that after the expiry of three years, the agreement may be renewed for another two years on terms to "be mutually agreed upon". A.V. alleged that on the 1st June, 1937 an agreement was arrived at and a written contract was to be prepared and signed later, whereas A.K. alleged that on the 8th June, 1937 three terms were settled and a written contract would have to be executed later.

*Held* : No oral agreement was arrived at as to all terms upon which the appointment of A.V. was to be continued ; neither party intended that the matter should be concluded by oral agreement at all and it was intended that they would enter into an agreement in writing. When written document was to be signed it was found that parties did not agree as to its terms. Thus the parties did not go beyond the stage of negotiation.

*Held further*, the fact that two consignments were supplied after the 1st June, 1937, could not be treated as conclusive of any more than that there was a mutual desire to achieve some continuity and that while negotiations were in progress petrol was supplied on an implied promise to be bound by reasonable terms and that it was clear that it was to everybody's interest that Moulmein should not be without supplies of petrol and the gap during which negotiation took place was bridged by the offer and acceptance of the two consignments.

*November 11.* The judgment of their Lordships was delivered by

LORD ROMER.: The respondents, Akoojee Jadwet & Co., are the sub-agents in the area comprising Moulmein and its neighbourhood for the distribution of the products of the Indo-Burma Petroleum

\* *Present* : LORD ATKIN, LORD THANKERTON, LORD ROMER, SIR GEORGE RANKIN and SIR SIDNEY ABRAHAMS.



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Company, Limited. The appellants A.V. & Son, of which the appellant Valliappa Chettiar was at all material times the managing partner and is now the sole proprietor, are a firm carrying on business in the same area. By a letter dated the 15th June, 1934, and addressed by the respondents to the appellant firm the respondents appointed the appellant firm to be sole distributors in the area of the petrol of the Indo-Burma Petroleum Company as from the 1st May, 1934. The only clauses of the letter that need be mentioned are the following :

" 2. Overriding Commission. You will pay us commission at the rate of Rs. 15 per wagon of 830 tins petrol sold to you by us.

6. You will remain the sole distributor of I.B.P. petrol in Moulmein and district for a period of three years from 1st May, 1934, subject to our holding the I.B.P. sub-agency, with the option of renewal of this distributorship for a further period of two years on terms which shall be mutually agreed upon."

The parties acted upon the terms contained in this letter down to the 30th April, 1937, when the appellant firm's appointment expired, subject to the possibility of their obtaining a renewal of it in exercise of the option given to them by Clause 6. Whether they obtained such a renewal depended, of course, upon whether they and the respondents could mutually agree upon the terms on which the renewal should take place. It should be mentioned that while they were acting as distributors up to the 30th April, 1937, the godown in which the petrol was stored was rented in the name of the appellant firm. The necessary licence enabling them to deal in that commodity also stood in their name, though it would appear that the rent of the godown and the fees payable for the licence were ultimately borne by the Indo-Burma Company.

Now it is alleged by the appellants that by an oral agreement made on the 1st June, 1937, between the appellant Valliappa on behalf of the appellant firm and E. M. Jadwet on behalf of the respondents the appointment of the appellant firm was renewed for two years from the 1st May, 1937, upon the same terms as those contained in the letter of the 15th June 1934. The respondents on the other hand deny that any such agreement was made or that the appointment of the appellant firm was renewed on the terms of that letter or upon any other terms. The appellants accordingly on the 20th August, 1937, instituted the present suit for the purpose of recovering damages from the respondents for their repudiation and breach of the alleged oral agreement of the 1st June, 1937. The Judge of the District Court of Amherst decided in favour of the appellants and by decree of the 30th January, 1939, awarded them a sum of Rs. 15,000 odd by way of damages, but his judgment and decree were reversed on appeal by the High Court of Judicature of Rangoon who by decree dated the 29th May, 1939, dismissed the appellants' suit with costs. From this decree of the High Court the appellants now appeal to His Majesty in Council. The question to be decided on the appeal is obviously a pure question of fact depending upon the proper conclusion to be drawn from the evidence adduced at the trial. Such evidence was partly documentary and partly oral and so far as now material was as follows :

On the 5th April, 1937, the respondents wrote to the appellant firm a letter in these terms :

" DEAR SIRs,

PETROL.

As you are well aware that the agreement appointing you as sole dealers for the sale of I.B.P. petrol will soon expire by the end of this month, we shall be glad to know

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as to what arrangement have you intend to make for renewal of it for another two years for which you have been given option conditionally on certain terms to be mutually agreed upon. We therefore beg to propose fresh terms by imposing our overriding commission at Rs. 25-15-0 per wagon load of 830 tins of petrol. An early reply will be much appreciated."

Valliappa was at this time in India and during his absence the business of the appellant firm was being managed by one Venkatesan, who on the 25th April, 1937, wrote to the respondents informing them that he had been instructed by Valliappa to request "that execution of the agreement be postponed until the 31st May, 1937, as he is returning to Burma with his family not later than that date." In the meantime Venkatesan had had an interview with Ebrahim Jadwet, the respondents' managing partner, at which the latter had agreed to reduce the proposed overriding commission from Rs. 25-15-0 to Rs. 17-8-0. On the 30th April, 1937, the respondents, in reply to Venkatesan's letter of the 25th April, wrote to the appellant firm agreeing to grant the time for which the letter had asked. It is to be noticed that what Valliappa had requested and what the respondents had agreed to grant was a postponement of the "execution" of the agreement. At this time therefore both parties contemplated that, if the appointment of the appellant firm was renewed at all, such renewal would be effected by means of a written and not a merely oral agreement.

Valliappa arrived at Rangoon from India on the 31st May, 1937, and at Moulmein early on the morning of the 1st June. In his evidence given before the District Judge he stated that on that same morning he went to the respondents' shop in Moulmein accompanied by Venkatesan. His account of what then took place was as follows :



" We met Ebrahim Mahomed Jadwet and he took me and Venkatesan upstairs. We then discussed renewal of the contract for a further term of two years. Ebrahim demanded commission Rs. 17-8 for a wagon load of petrol. The previous rate was Rs. 15. I asked him to accept the old rate of Rs. 15. He finally accepted the Rs. 15 rate. It was agreed that the contract should be renewed on those terms for two years."

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The witness then added these very significant words :

" He said that he would prepare the contract and that he would send for me to sign it."

From this account of the crucial interview on the 1st June two things emerge quite plainly. The first is that a written contract was to be prepared and presented to Valliappa for signature at a later date. The second is that the only term of such contract that was discussed and settled at the interview in question was the amount of the respondents' overriding commission. As to this however Venkatesan, who was examined upon commission, would seem at first sight to have gone rather further. For his account of the interview was as follows : " Valliappa Chettiar requested Ebrahim Jadwet not to raise the overriding commission from Rs. 15 per wagon. After some discussion between them they agreed that the period of agreement should be extended for two years on the same terms and conditions as in the agreement of 1934." But the inference to be drawn from this is that the only matter that was the subject of the " discussion " was the commission ; and it seems probable that this question having been settled it was assumed by Venkatesan that, as no further terms were discussed, a renewal of the employment of the appellant firm on the same terms as before followed as a matter of course. For in his cross-examination are to be found

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the following question and answer : “ (Q.) Is it not true that the defendants could terminate the relationship with A.V. & Son after 30th April, 1937, if they wished to do so without giving time till 31st May, 1937 ? (A.) No, they cannot. A.V. & Son had the option of renewing the agreement for a fresh period of two years.” In this, of course, the witness was wholly mistaken. The appellant firm’s option was not to renew the agreement, but to renew the distributorship on terms which should be mutually agreed upon. It is possible that Valliappa was himself labouring under the same mistake. It should be added that Venkatesan confirmed the latter, as to it having been arranged at the interview that the parties should in a few days “ execute ” a short agreement to the effect that he had described.

This evidence of Valliappa and Venkatesan was flatly contradicted by E. M. Jadwet who denied that those two gentlemen came to see him on the 1st June at all. According to him Valliappa did not come to see him until the 4th June, and on that day came alone. He said that nothing was then settled, but that on the 8th June Valliappa again came to see him and again came alone ; that on that day the three following points were discussed and settled : (1) that the respondents’ commission should be Rs. 15. (2) that the licence and godown lease should be in the respondents’ name. (3) that there should be no further option of renewal ; and that Valliappa would “ execute ” the agreement in a day or two.

It is in their Lordships’ view quite immaterial which of these two widely different accounts of what happened down to the 8th June be accepted. For it is quite clear that not only had no oral agreement been arrived at as to all the terms upon which the appointment of the appellant firm should be continued,

but that neither party intended that the matter should be concluded by an oral agreement at all. The parties were "to execute an agreement" or "sign a contract"; that is to say enter into an agreement in writing. That this was so is made still clearer by what took place on the 10th June. Upon that date Valliappa went to see E. M. Jadwet accompanied by his clerk Xavier. Jadwet produced a written agreement for signature by Valliappa, such agreement embodying all the three points that according to Jadwet had been settled on the 8th June. Valliappa says that though he was willing to forego the right of renewal of the appointment he objected to the provision as to the licence and godown lease being in the name of the respondents and refused to sign the agreement containing that provision. He accordingly (and, as he says, at the request of Jadwet) caused Xavier then and there to prepare an agreement such as he was prepared to sign. This document which was marked Exhibit M at the trial was in these terms:

"It is hereby agreed between the contracting parties signed under that the petrol agreement dated the 15th June, 1934, be renewed and is renewed hereby for a further period of two years with effect from the 1st May, 1937, on the terms and conditions stipulated herein."

The word "herein" may perhaps have been a mistake for "therein" though in view of the answer given in cross-examination by Valliappa presently to be mentioned this is by no means certain. But, however that may be, it is plain that the document was not intended to be a mere memorandum in writing of an oral agreement already concluded. The words "it is hereby agreed" and the words "is renewed hereby" are wholly inconsistent with such an idea. The question is however placed beyond all

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that the parties never got beyond the stage of negotiation, and that the renewal of the appointment of the appellant firm was never finally agreed. This was the conclusion arrived at by the High Court, and in that conclusion their Lordships concur.

It only remains to mention one other matter. The appellants sought to find some support for their contention that a binding oral agreement was reached on the 1st June, 1937, in the fact that a wagon of petrol was delivered to the appellant firm on the 8th June of that year and another on the 12th June. In the High Court the learned Chief Justice dealt with this fact as follows: "I cannot myself find this conclusive of any more than that there was a mutual desire to achieve some continuity and that whilst negotiations were in progress petrol was supplied on an implied promise to be bound by reasonable terms, and it is clear that it was to everyone's interest that Moulmein should not be without supplies of petrol, and the gap during which negotiations took place was bridged by the offer and acceptance of the two consignments." With these observations their Lordships are in complete agreement.

For these reasons, which are substantially those given by the High Court, their Lordships are of opinion that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The appellants must pay the respondents' costs of the appeal.

## APPELLATE CRIMINAL.

*Before Sir Herbert Dunkley, Acting Chief Justice, and Mr. Justice Gledhill.*

## THE KING v. MAUNG PO AND OTHERS.\*

1946

May 9.

*Confessions recorded by B.M.A. magistrate—Meaning of magistrate—Admissibility as evidence before a criminal court of the civil government—Evidence Act, ss. 26, 80—Proclamation Nos. 1, 2 and 6 of 1944 of Supreme Allied Commander—Burma Indemnity and Validating Act, 1945, s. 5—Burma General Clauses Act, s. 2 (36).*

A magistrate validly appointed, as such under the British Military Administration of Burma, was a "magistrate" within the meaning of s. 26 of the Evidence Act and therefore confessions recorded by him can be proved in a trial before a municipal Court of British Burma.

*Queen-Empress v. Sunder Singh and others*, I.L.R. 12 All. 595; *Q.E. v. Nagla Kala*, I.L.R. 22 Bom. 235; *Emperor v. Hulasi*, A.I.R. (1933) All. 286; *In re Panchanatham Pillai*, I.L.R. 52 Mad. 529; *Empress v. Ramanjiyya*, I.L.R. 2 Mad. 43, referred to.

*Tun Byu* (Government Advocate) for the applicant.

DUNKLEY, A.C.J.—By his order of reference, dated the 3rd of April, 1946, Mootham J. has referred the following question for decision by a Bench of this court :

"Whether the confession of an accused person recorded on or after the 24th day of February, 1945, and during the period of the British Military Administration of Burma by an Assistant Township Officer appointed by that Administration is, if relevant, admissible in evidence."

By "an accused person" the learned Judge obviously meant a person in the custody of the police of the British Military Administration. Since this reference was made Mootham J. has left this Court, and therefore this Bench will have to come to a decision on the whole case, and consequently we do not propose to answer the question in the exact

\* Criminal Reference No. 1 of 1946 arising out of Criminal Revision No. 374A of 1946 from the order of U San Dun, Second Special Judge of Mōnywa, in Criminal Regular Trial No. 110 of 1945.



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form in which it has been propounded, although the question will, in fact, be answered in the course of this judgment.

On the 1st of August, 1945, a house in Leshe-ywathit village was attacked by a number of dacoits, who carried away a considerable amount of property. In connection with this dacoity five persons were sent up for trial before the learned Special Judge of the Lower Chindwin district. The trial was not completed until the 4th of February, 1946, whereas the ordinary civil administration of Burma was restored on the 16th of October, 1945, on which date the Military Administration of Burma came to an end. All five accused were convicted by the learned Special Judge of an offence under section 395 of the Penal Code and each of them was sentenced to seven years' rigorous imprisonment and thirty lashes of whipping. During the month of August, 1945, each of the five accused made a confession before the Assistant Township Magistrate of Kani, U Than Pe, and those confessions were received in evidence at the trial. As against four of the accused there was evidence to establish that dacoited property was recovered from each of them and, apart from their confessions, the evidence on record is sufficient to justify their convictions. As regards the fifth accused, Pauk Hla, there was no evidence against him except his own confession and if his confession is not admissible in evidence then his conviction and sentence will have to be set aside. Hence the point which is raised by this revision matter is the question whether confession recorded by an Assistant Township Magistrate appointed under the Military Administration of Burma are admissible in a trial before a criminal Court of the civil Government.



The relevant sections of the Evidence Act in regard to the admissibility of confessions are sections 26 and 80. Under section 26, no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a magistrate, shall be proved as against such person. By section 80, whenever any document is produced before any Court, purporting to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by a Judge or Magistrate, certain presumptions follow. Consequently, it is necessary to consider, first, whether U Than Pe was a "magistrate", within the meaning of section 26, when he recorded these confessions, and, secondly, whether the confessions were recorded in accordance with law, the law being, of course, the Municipal law of Burma and not the law of the Military Administration. I will deal with this second, and shorter, point first.

The section of the Code of Criminal Procedure which deals with confessions is section 164, and this section occurs in Chapter XIV of the Code. Now, by section 14, clause (j), of the Courts (Emergency Provisions) Act, 1943, which is still in force, the operation of the provisions of Chapter XIV of the Code of Criminal Procedure is suspended, and it is directed that offences shall be inquired into or investigated and information thereof recorded in such manner as may be prescribed by rules notified by the Governor in this behalf. Such rules were notified by Defence Department Miscellaneous II Branch Notification No. 794, dated the 1st July, 1943. Under Rule 9 of these rules, any magistrate may record any statement or confession made to him in the course of an investigation, and

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it is further provided that such statements shall be recorded in such manner as, in the opinion of the magistrate, is best suited to the circumstances of the case, and a confession must be signed by the accused and by the magistrate. Actually, in this particular case, all five confessions were recorded in accordance with the provisions of section 164. The confessions, therefore, comply with Rule 9 of the aforementioned rules, and, consequently, it is clear that the confessions were "taken in accordance with" law, within the meaning of section 80 of the Evidence Act.

Turning now to the first point. By his Proclamation No. 1 of 1944, dated the 1st January, 1944, the Supreme Allied Commander assumed responsibility for the Judicial Administration of Burma and at the same time he delegated to the Chief Civil Affairs Officer, Burma, full authority to conduct, or his behalf, the administration of the civil population of Burma. By Proclamation No. 2 of 1944, of the same date, the Chief Civil Affairs Officer, acting under the authority which was delegated to him directed that

"No person shall act as judge or magistrate or otherwise exercise judicial powers in any capacity unless appointed by me or under my authority."

He further directed that the provisions of all law in force in Burma on the 31st day of December 1943, should be deemed to remain in force except in so far as they might be suspended, varied or supplemented by any Proclamation, Regulation or Order made by him or under his authority. By Proclamation No. 6 of 1944, dated the 22nd July 1944, the Chief Civil Affairs Officer delegated to Senior Civil Affairs Officers authority to appoint



Township Officers and Assistant Township Officers. U Than Pe, the officer who recorded these five confessions, was appointed as Assistant Township Officer of Kani on the 14th of June, 1945 by a Senior Civil Affairs Officer acting under this delegated authority. By Appointment Order (Legal) No. 21 of 1945, dated the 24th February, 1945, the Chief Civil Affairs Officer directed that every Assistant Township Officer, duly appointed in accordance with the provisions of Proclamation No. 6 of 1944, should exercise the powers of a Magistrate of the Second Class. Consequently, it appears that U Than Pe was duly appointed a Magistrate of the Second Class of the Military Administration of Burma. Now, by section 5 of the Burma Indemnity and Validating Act, 1945, all laws, proclamations, orders, rules, regulations and legislative acts whatsoever made or issued during the war period by or with the assent of any British or Allied Military authority shall be deemed to be and always to have been valid and of full effect until such military authority shall have been superseded in the relevant area by the lawfully constituted legislative authority of Burma. The result is that, under the municipal law of Burma, U Than Pe was a Second Class Magistrate, validly appointed by the Military Administration, up to the 16th of October, 1945. But this conclusion does not completely solve the problem with which we are faced in this case. By clause (36) of section 2 of the Burma General Clauses Act, "magistrate" shall include every person exercising all or any of the powers of a magistrate under the Code of Criminal Procedure. This definition is not exclusive and it suggests that there may be magistrates who do not exercise all or any of the powers of a magistrate under the

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Code of Criminal Procedure, and the point which we have to decide is whether a person who was exercising the powers of a magistrate under the law administered by the Military Administration of Burma can, after that administration has come to an end, still be considered to be a magistrate for the purpose of section 26 of the Evidence Act; in other words, whether a magistrate under a system of law which is not the system in force in Burma is, nevertheless, a magistrate for the purpose of section 26. There is ample authority for answering this question in the affirmative.

In *Queen-Empress v. Sunder Singh and others* (1) a Bench of the Allahabad High Court held that certain confessions recorded by a magistrate of a native State were admissible in a trial held before a Court of Session in British India. This decision has been followed in a number of other cases. In *Queen-Empress v. Nagla Kala* (2) it was held that the words "police officer" and "magistrate" in section 26 of the Evidence Act include the police officers and magistrates of native States as well as those of British India. See also *Govinda v. Emperor* (3), and *Emperor v. Hulasi* (4). In *In re Panchanatham Pillai* (5) it was held that, under section 26 of the Evidence Act, British Indian Courts are not precluded from taking into consideration confessions made by prisoners in police custody to magistrates in a foreign country, the definition of "magistrate" in the General Clauses Act not being confined to magistrates exercising jurisdiction under the Code of Criminal Procedure. Consequently, U Than Pe, Assistant

(1) I.L.R. 12 All. 595.

(3) 23 Cr.L.J. 673.

(2) I.L.R. 22 Bom. 235.

(4) A.I.R. (1933) All. 286.

(5) I.L.R. 52 Mad. 529.

Township Magistrate of Kani, validly appointed as such under the British Military Administration of Burma, was a "magistrate" within the meaning of section 26 of the Evidence Act, and, therefore, confessions recorded by him can be proved in a trial before a municipal Court of British Burma.

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Hence the confessions of the five accused in this case were all admissible in evidence. All the accused were, therefore, rightly convicted, and, in view of the seriousness of the dacoity, the sentences were suitable. There is no ground for interference in revision with either the convictions or the sentences.

GLEDHILL, J.—I agree, but I desire to add a few remarks regarding the interpretation of section 26 of the Evidence Act.

The word "magistrate" in that section must be interpreted according to the definition in subsection (36) of section 2 of the General Clauses Act except in so far as that definition is qualified by the explanation to section 26 of the Evidence Act.

The General Clauses Act says that the word "magistrate" shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure.

The explanation to section 26 of the Evidence Act was added in 1891 in consequence of a decision of the Madras High Court in *Empress v. Ramanjiyya* (1) that the word "magistrate" in section 26 of the Evidence Act included a Village Munsiff, and was not confined to the class of persons who are magistrates within the meaning of the Criminal Procedure Code.

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(1) I.L.R. 2 Mad. 4.



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In *Queen-Empress v. Sunder Singh* (1), decided in 1890, it was held that a magistrate of the Gwalior State was a "magistrate" for the purposes of section 26 of the Evidence Act, so that, while the object of Indian Act III of 1891 was to add to section 26 of the Evidence Act an explanation which excluded certain village functionaries from the category of magistrates capable of recording confessions admissible in evidence of persons in police custody, the intention of the legislature could not have been to restrict the meaning of the word solely to persons appointed as magistrates under the Code of Criminal Procedure.

Four cases decided since the amendment have been cited. In *O.E. v. Nagla Kala* (2), *Govinda v. Emperor* (3) and *Emperor v. Hulasi* (4) it was held that a magistrate of an Indian Native State was a "magistrate" for the purposes of section 26 of the Evidence Act, but in *In re Panchanatham Pillai* (5) it was held that a *juge d'instruction* in French India was also a "magistrate" for the same purpose. It is probable that the powers and procedure of magistrates in Native Indian States approximate very closely to those of magistrates in British India, but in the case last cited the official who recorded the confession was administering a different system of law. He was described as "a sort of committing magistrate with powers to commit or discharge a prisoner, but not to convict". It was nevertheless held that he was a "magistrate" within the meaning of section 26 of the Evidence Act.

(1) I.L.R. 12 All. 595.

(3) 23 Cr.L.J. 673.

(2) I.L.R. 22 Bom. 235.

(4) A.I.R. (1933) All. 286.

(5) I.L.R. 52 Mad. 529.



The law administered by the magistrates appointed under the British Military Administration was, in so far as any question arising out of this reference is concerned, identical with that at present administered by magistrates appointed by the Governor under the Code of Criminal Procedure.

A validly appointed magistrate of the British Military Administration is therefore a "magistrate" for the purposes of section 26 of the Evidence Act.

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## APPELLATE CRIMINAL.

*Before Mr. Justice Ba U and Mr. Justice Wright.*

1946

May 31.

## THE KING (APPLICANT)

v.

## HLA MAUNG (RESPONDENT).

*Right of private defence—S. 97 of Penal Code—Plea not raised by accused—Court should take notice if evidence warrants—Reasonable apprehension of danger of life—Accused justified in killing the assailant.*

*Held* : Even though the right of private defence under s. 97 of Penal Code be not pleaded or suggested by the accused, yet the matter should be considered or be put before the Jury, by the Court for consideration and a verdict of not guilty may be properly given.

*The King v. Upendra Nath Das*, 19 C.W.N. 653 (F.B.), followed.

*Held* : In exercising the right of private defence, a person is not obliged to modulate his defence step by step or to retreat ; he is entitled to secure his victory till he finds himself out of danger. Where assault assumes dangerous form, every allowance should be made for one who for self preservation goes a little further than a perfectly cool bystander would. The point for consideration is whether there was a reasonable apprehension of danger to life.

*Alingal Kuntunayan and another v. K.E.*, I.L.R. 28 Mad. 464 ; *Bhut Nath Dave v. K.E.*, 13 C.W.N. 1180 ; *Radhey and others v. Emperor*, 24 Cr.L.J. 735, followed.

When the accused ran away and was pursued by the deceased with a dagger in hand, and when he could not run further turned round, embraced the deceased and gave three stabs in the back and as a result of one of the stabs, the deceased died, the accused could not be said to have exceeded his right of private defence.

*Choon Fong* (Government Advocate) for the applicant.

*Maung Maung Latl* for the respondent.

BA U, J.—The facts of this case are simple and lie within a narrow compass. The question that calls for decision is a question of law, and that is, whether the respondent Hla Maung has committed any offence and, if so, what offence ?

\* Criminal Reference No. 25 of 1946 and Criminal Review No. 132 of 1946 under Special Judges Act, 1943, against the order of Special Judge of Pyapôn, dated the 4th April 1946, passed in Criminal Regular Trial No. 9 of 1946.

The facts that are not in dispute are these :

On the morning of the 15th February, 1946, there was an "Ayo-kauk" ceremony (bone picking ceremony) held by the Karens of Khayayo village at the village cemetery. Both the respondent Hla Maung and the deceased Maung Mya attended that ceremony, where they had a lot of drink. At about mid-day, the respondent went with the deceased to the latter's house at Aingtalok village, which is evidently not far from Khayayo village. The evidence as to what exactly happened between the respondent and the deceased at the latter's house is not clear. But if the evidence of Ma Sein Tin (P.W. 6), wife of the deceased, is read together with the evidence of U San Bwint (P.W. 1), what appears to have happened is this. On arrival at the house of the deceased, the deceased and the respondent started having a quarrel and in the course of the quarrel the respondent ran out of the house chased by the deceased. Both of them were armed with a dagger each. When the respondent had run some distance—it might be about 60 or 70 yards according to U San Bwint's evidence—he turned round, embraced the deceased and stabbed him in the back three times. The respondent then went away. The deceased tried to follow him but after going a few steps he fell dead. His wife Ma Sein Tin came up to the scene of the crime and shouted out for help. Some of the villagers turned up and found Maung Mya lying dead with three stab wounds on the back, one of which according to the medical evidence, was sufficient in the ordinary course of nature to cause death. A report was at once sent to U Kyaw Hmu (P.W. 9), the headman of Khayayo village. The headman turned up and had the dead body sent

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to the Yondaung police station. The headman then arrested the respondent and sent him to the police station. He was found to have an injury on the right hip.

The respondent in the course of his evidence given in the trial Court explained how he had come by that injury. He said

"When we reached Maung Mya's house we found Ma Sein Tin there. Ma Sein Tin is my cousin and the wife of Maung Mya. Maung Mya being drunk tried to stab me with a dagger and I ran out of the house. When I had run about 100 yards I fell down and Maung Mya who was chasing me stabbed me on my left hip. \* \* \* I did not stab Maung Mya."

From this evidence what is clear is that his defence was one of denial. He did not plead that his case was covered by section 97, or fell within one of the Exceptions to section 300 of the Penal Code. Because of the failure to put forward this plea, the learned trial Judge has made the following observations :

"However, whatever the case may have been, the accused has not pleaded that he stabbed Maung Mya while being deprived of the power of self-control by grave and sudden provocation or that he stabbed him in the exercise in good faith of the right of private defence of his body, or that he stabbed him without premeditation in a sudden fight in the heat of passion upon a sudden quarrel. Instead of raising a defence on any of these grounds, he has put forward a story which I cannot believe, namely, that he was stabbed by the deceased, and that he never stabbed the deceased at all."

Now, if the respondent had put forward any of the pleas as pointed out by the learned trial Judge, it appears to my mind that the learned trial Judge would have either acquitted the respondent or else would have found him guilty of a minor offence. But

because the respondent had not put forward the plea that his case was covered by one of the Exceptions of the Penal Code, the learned trial Judge evidently thought he was precluded from considering it. In the Full Bench case of *The King v. Upendra Nath Das* (1), Stephen J. observed

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"It is the duty of a Judge to make a case for the accused on which he thinks that a verdict of not guilty may be properly returned though the case has not been suggested by or on behalf of the accused."

In the same case Woodroffe J. said

"It cannot be laid down as a general proposition of universal applicability that a Court cannot and should not consider a case in favour of the accused which he has not raised. If such a case arises on the prosecution evidence, it should be put to the jury for their consideration whatever line might have been taken by the accused or his counsel."

Mookerjee J. similarly observed :

"The mere fact that counsel for the accused has failed to present to the Court a particular aspect of the case cannot justify an omission on the part of the Judge to draw the attention of the jury to what appears to be a possible answer to the charge against the accused even on the prosecution evidence : it would be the duty of the Judge to draw the attention of the jury to such possible view of the case on the evidence notwithstanding that it may have escaped the counsel for the accused."

Other High Courts in India have also taken the same view as the Calcutta High Court : see the cases collected by the author of Ratanlal's Law of Crimes under section 96 of the Penal Code. Therefore, on the facts as presented by the prosecution, the learned trial Judge should, in my opinion, have considered the question as to whether the respondent

(1) 19 C.W.N. 653.

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was entitled to claim the benefit of section 97 of the Penal Code. Section 97 is *inter alia* in these terms :

"Every person has a right, subject to the restrictions contained in section 99, to defend—

*First.*—His own body, and the body of any other person, against any offence affecting the human body ;"

Section 99 says :

"The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence."

Then there is section 100 which must also be considered. It states :

"The right of private defence of the body, extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely—

*First.*—Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault ;

*Secondly.*—Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault ;"

The effect of these three sections is this. A person has a right to defend his body or that of another against aggression and in doing so he can even go to the extent of killing his assailant if he apprehends that there is a likelihood of death or grievous hurt resulting from such aggression. He must not, however, use more force than necessary, that is to say, he can use only such force as is necessary to secure his safety or avert the danger. Whether more force than necessary has been used



in any given case is a question not easy to solve. A man placed in an imminent danger of losing either his life or limb is dominated solely by his desire to secure his safety and if in pursuance of that desire he uses more force than a cool bystander would, he should not in my opinion be held as exceeding the right of private defence. Every allowance should in my opinion be made for the stress, danger and excitement under which he labours. In dealing with this question the eminent jurist Mayne said :

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"But a man who is assaulted is not bound to modulate his defence step by step, according to his attack, before there is reason to believe the attack is over. He is entitled to secure his victory, as long as the contest is continued. He is not obliged to retreat, but may pursue his adversary till he finds himself out of danger ; and if, in a conflict between them, he happens to kill, such killing is justifiable. And, of course, where the assault has once assumed a dangerous form every allowance should be made for one, who, with the instinct of self-preservation strong upon him, pursues his defence a little further than to a perfectly cool bystander would seem absolutely necessary. The question in such cases will be, not whether there was an actually continuing danger, but whether there was a reasonable apprehension of such danger."

These observations were cited with approval by White C.J. and Benson J. in *Alingal Kuntunayan and another v. K.E.* (1).

Jenkins C.J. also took the same view as Mayne and said in the case of *Bhut Nath Dave v. K.E.* (2):

"A man in the predicament of the accused could not be expected to judge too nicely."

Ryves J. used, if I may say so with respect, rather picturesque language in giving his views on

(1) 28 Mad. 454.

(2) 13 C.W.N. 1180.

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this question in *Radhey and others v. Emperor* (1).  
He said :

" When exercising the right of private defence it is difficult to expect the person to weigh 'with golden scales' what maximum amount of force is necessary to keep within that right."

Now, if we consider this case in the light of these observations, I do not think that we shall find any difficulty in deciding what conclusion we must come to. As pointed out above, the respondent ran away, chased by the deceased with a dagger in his hand. Only when he evidently found that he could not run further, he turned round, embraced the deceased and gave him three stabs in the back. Only one of these stabs caused a wound which according to the medical evidence was sufficient to cause death in the ordinary course of nature. On the facts I would hold that the respondent did not exceed the right of private defence and I would accordingly set aside the conviction and sentence and direct his release so far as this case is concerned.

WRIGHT, J.—I agree.

## APPELLATE CRIMINAL.

*Before Mr. Justice Ba U.*

## ULLA AND OTHERS v. THE KING.\*

1941  
Dec. 3.*Rioting—Hurt—Committed at the same time—Separate sentences called for—Ss. 147, 225[149, 333]149 and 395, Penal Code.*

*Held*, that separate sentences should be passed under s. 147 of the Penal Code when the accused is convicted of rioting and of hurt which he has himself not committed, but for which he is liable under s. 149 of the Penal Code.

*Q.E. v. Bana Punja and others*, I.L.R. 17 Bom. 260; *Q.E. v. Bisheshar and others*, I.L.R. 9 All. 645; *Nga Son Min and eighteen others*, 3 B.L.J. 49, followed.

*B. K. Ghosh v. Emperor*, I.L.R. 52 Cal. 197 (P.C.), referred to.

*Keamuddi Karikar v. Emperor*, I.L.R. 51 Cal. 79; *H. M. Bangal and others v. Jagananda Das*, 4 C.W.N. 245; *Bajo Singh v. K.E.*, I.L.R. 8 Pat. 274; *In re Ponniah Lopes and seven others*, I.L.R. 54 Mad. 643, dissented from.

*E Maung* (Government Advocate) for the respondent.

.. BA U, J.—I propose to dispose of all these appeals and revision proceedings in this judgment as they arise out of the same case. The facts are these :

On the 27th February 1940, Maung Saw Hla, Sub-Inspector of Excise, with the help of his servants and a few others arrested 35 Chittagonians near the foot of the hills leading to Angdaing Pass in Maungdaw township for being found in possession of contraband salt. Soon after, several Chittagonians from neighbouring villages turned up and demanded the release of the 35 smugglers. When Saw Hla refused to do so, they started belabouring him and his followers with sticks. They

\* Criminal Appeal Nos. 837 to 844 of 1941 and Criminal Revision Nos. 485A to 492A of 1941 from the order of the Additional Sessions Judge of Arakan in Session Trial No. 3 of 1941.



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then released the smugglers and took away one double-barrelled gun and some properties belonging to Saw Hla and his party. Saw Hla was subsequently found lying in an unconscious state and his life was, according to medical evidence, in danger for over 20 days.

On these facts the appellants were convicted under sections 147, 225 1st part/149, 333/149 and 395 of the Penal Code and they were given various terms of imprisonment under sections 225/149, 333/149 and 395, but no sentence was passed under section 147. No reason was given why the sentence was not passed under the said section. For these reasons the appeals were admitted and revision proceedings were opened calling upon the appellants to show cause why a sentence of imprisonment under section 147 should not be passed. They all appeared and submitted that they were not some of the rioters. I have checked the evidence carefully and I am satisfied that their participation in the riot is proved beyond any doubt.

If not for the consideration of the question whether or not sentences under section 147, in such circumstances as are obtaining in this case should not be passed upon the appellants, all these appeals might have been dismissed summarily.

On this question there is a conflict of decisions. The High Courts of Calcutta, Madras and Patna held that where the accused is convicted of rioting and of hurt which he has himself not committed, but for which he is liable, under section 149 of the Penal Code, no separate sentence can be passed on him. *Keamuddi Karikar v. Emperor* (1); *Hriday Mondal or Bangal and others v. Jagananda Das* (2);

(1) 51 Cal. 79.

(2) 4 C.W.N. 245.

*Bajo Singh v. King-Emperor* (1); *In re Ponniah Lopes and seven others* (2). On the other hand the High Courts of Bombay, Allahabad and this Court held that separate sentences can be passed. *Queen-Empress v. Bana Punja and others* (3); *Queen-Empress v. Bisheshar and others* (4); *Nga Son Min and eighteen others v. King-Emperor* (5).

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I do not propose to go into the discussion of these various authorities for, in my opinion, the conflict has been settled by a decision of their Lordships of the Privy Council. If section 149 of the Penal Code creates a specific offence, section 71 of the Penal Code then does not apply. In *Barendra Kumar Ghosh v. Emperor* (6), their Lordships of the Privy Council state :

"The other part of the appellant's argument rests on sections 114 and 149, and it is said that, if section 34 bears the meaning adopted by the High Court, these sections are otiose. Section 149, however, is certainly not otiose, for in any case it creates a specific offence and deals with the punishment of that offence alone."

This observation of their Lordships of the Privy Council, taken in conjunction with the amendment of section 35 of the Criminal Procedure Code, in my opinion, supports the view taken by this Court. Therefore, I hold that a separate sentence should have been passed upon the appellants under section 147.

I, accordingly, direct that such of the appellants do suffer six months' rigorous imprisonment under section 147 of the Penal Code. I notice that all the sentences of imprisonment passed under the other sections were directed by the learned trial Judge to

(1) 8 Pat. 274.

(2) 57 Mad. 643.

(3) 17 Boin. 260.

(4) 9 All. 645.

(5) 3 B.L.J. 49.

(6) 52 Cal. 197 at 211.

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run consecutively. The effect of such an order is that each of the appellants will have to undergo nine years' rigorous imprisonment. It is true that the offences were serious, but in view of the fact that these appellants are first offenders, I do not think such a severe punishment as this is called for. For these reasons, I direct that the sentences passed under sections 395, 225/149 and under 147 will run consecutively, but the sentence of three years' rigorous imprisonment passed under section 333/149 will run concurrently with the sentence passed under section 395. In other words, each of these appellants will have to undergo six and a half years' rigorous imprisonment.



## CRIMINAL REVISION.

*Before Mr. Justice Thein Maung.*

## MUTIA v. THE KING.\*

1946  
May 3.

*Defence of Burma Act—Cessation of hostilities—Termination of War for the purposes of Municipal Law.*

*Held*, that the Defence of Burma Act is still in force even though the hostilities have ceased as no treaty of peace has been signed or ratified and the Crown has not yet declared that the War is over for the purposes of Municipal law.

Sastry for the applicant.

Chan Tun Aung (Government Advocate) for the Crown.

THEIN\* MAUNG, J.—The petitioner Mutia has been found guilty of having been in unauthorized possession of one bale and five loose pieces of cloth which belonged to the Army and has been sentenced to four months' rigorous imprisonment under section 115A of the Defence of Burma Rules.

Mr. Sastri, the learned counsel for Mutia, has contended that the charge under the said Rule cannot be sustained for the reason that the Defence of Burma Act has spent itself and was not in force on the 9th of March, 1946, *i.e.* the date of the offence. The learned District Magistrate has observed in the course of his judgment :

"As far as I am aware the War has not come to an end officially. Wars are formally brought to an end by an Act of the Legislature *cf.* India Act No. V of 1919 'Termination of the Present War (Definition) Act, 1919'. It is presumed that

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\* Criminal Revision No. 13B of 1946 from the Order of the District Magistrate of Rangoon in Criminal Regular Trial No. 20 of 1946.

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a similar Act will be passed for this country sooner or later but so far no such Act has been enacted. However, that being so I hold that the Defence of Burma Act and the Rules thereunder are still in force in Burma."

The learned counsel is unable to produce any authority in support of his contention that the War is over and the Defence of Burma Act has spent itself. On the other hand U Chan Tun Aung, the learned Government Advocate, has drawn my attention to McNair on "Legal Effects of War" at pages 5 and 6 of which the following passage occurs :

"End of war. Similarly, it is important to know definitely when a state of war comes to an end, so that normal commercial and other intercourse with the late enemy may be resumed. An armistice does, of course, not produce this result, and during the period of the armistice which concluded hostilities between the Allies and Germany in 1918 a Norwegian ship and her contraband cargo captured on a voyage to a German port were condemned as prize. Nor does the signature of a treaty of peace have that effect so long as the treaty remains unratified. But in a number of cases wars have come to an end by mere cessation of hostilities and the belligerents have drifted into a state of peace. In such a case a British Court would look to the Crown for guidance on the question of the moment at which the state of war ceased, and there is little doubt that such guidance would be forthcoming. Towards the close of the War of 1914 to 1918 Parliament, by the Termination of the Present War (Definition) Act, 1918 conferred upon the Crown in Council power to declare the date of the termination of the war as regards any provision in any Act of Parliament, Order in Council, or Proclamation, or in any contract, deed or other instrument referring to the existing war or hostilities; such date was to be as nearly as might be the date of the exchange or deposit of ratifications of the treaty or treaties of peace, and might differ in the cases of the different enemy States."

He also invited my attention to the following passage at page 332 of Schwarzenberger's "International Law":

"In this respect, there is a vital difference between an armistice agreement, temporarily suspending active hostilities, and a peace treaty. As the British-Turkish Mixed Arbitral Tribunal pointed out in *Ahmed Emin Bey v. Great Britain* (1927), acts of war, such as the internment and deportation of enemy subjects, may be committed also after the conclusion of an armistice treaty, for 'the state of war', in the legal meaning of the term, continues until the conclusion of the peace treaty."

The War may be over from the point of view of the man in the street as hostilities have ceased. However, no treaty of peace has been signed or ratified and the Crown has not yet declared that the War is over for the purposes of Municipal law. I must accordingly hold that the Defence of Burma Act is still in force and that a charge under Rule 115A of the Defence of Burma Rules is still sustainable.

[On evidence the learned Judge held that the District Magistrate was right in holding that the petitioner was found in possession of goods.]

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## APPELLATE CRIMINAL.

*Before Mr. Justice Mootham.*

1946

Mar. 20.

## THE KING (APPLICANT)

v.

## SIT THEIN AND ONE (RESPONDENTS).

*Interpretation of Statute—Alternative interpretation—One leading to smooth working preferred—Ss. 3, 4 and 139, Government of Burma Act, 1935—Governor exercising power outside Burma—If valid—Proclamation under s. 139 published in India in Burma Gazette—If valid and amounts to proclamation—S. 6 (2) of Special Judges Act †—If ultra vires—S. 6 (2) if suspends High Court's powers—Governor in enacting the section if interferes with jurisdiction of High Court—Examination of accused on oath under the Criminal Procedure Code as amended before charge whether vitiates conviction—Circumstances when conviction to be set aside for failure to observe rules of procedure—Right of private defence when not available.*

*Held:* When alternative constructions of a section of a statute are possible, the alternative which leads to smooth working of the system which the Statute regulates is to be preferred to one which leads to uncertainty, friction or confusion.

*Shannon Realities v. St. Michel*, (1924) A.C. 185, 192, followed.

Proclamation under s. 139 of Government of Burma Act, 1935 issued in *Burma Gazette* published in India where the Governor moved on occupation of the greater portion of Burma by the Japanese, was a sufficient and valid proclamation under the Act.

Under ss. 3 and 4 of Government of Burma Act, the power to exercise executive authority vests in Governor and he is entitled to exercise his power even when he is outside Burma.

S. 6 (2) of Special Judges Act (Burma Act X of 1943) is not *ultra vires*. Provision in the sub-section that when death sentence is passed the proceedings should be submitted for review to a Judge of the High Court does not involve suspension of the law administered by the High Court. A High Court Judge in reviewing the order of a special judge acts as *persona designata*. The vesting in the Governor power to nominate the Judge who will hear such reviews does not involve

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\* Criminal Review under section 6 (2), Special Judges Act (No. 69 of 1946 against the order of 1st Special Judge of Thayetmyo, dated the 9th January 1946, in Trial No. 30 of 1945).

† Special Judges Act (X of 1943) has since been repealed by Act IX of 1946 and section 6 has been recast. In case of sentence of death chapter XXVII of the Code of Criminal Procedure will apply and an appeal will lie in case of conviction by a Special Judge.—*Editor*.

assumption by the Governor of any power of the High Court within the meaning of the proviso to s. 139 of Government of Burma Act. Special Judges Act does not supersede or abolish the Court of Sessions, but creates a new class of courts.

Examination on oath of accused persons before the framing of charge was clearly not in accordance with the chapter XXI of the Code of Criminal Procedure, as amended by the Burma Act XIII of 1945. But non-compliance of a mandatory rule of procedure does not necessarily render the trial void. If such non-compliance has led to miscarriage or failure of justice, then only the trial will be vitiated otherwise the irregularity will be cured by s. 537 of the Code of Criminal Procedure.

*K.E. v. Nga Po Min*, I.L.R. 10 Ran. 511, 516 and *Emperor v. Erman Ali*, I.L.R. 57 Cal. 1228, followed.

Right of private defence has been allowed by the law for the purpose of defence only and no man can be allowed to take advantage of the right to kill with a vengeful motive.

*Po Mye v. The King*, [1940] Ran. 109, 117.

*Chan Tun Aung* (Government Advocate) for the applicant.

*Sastry* for the respondents.

MOOTHAM, J.—The proceedings of Trial No. 30 of 1945 of U Shwe Pon sitting as a Special Judge at Thayetmyo, in which the two accused, Sit Thein and Tun Yin, were convicted and sentenced to death, have been submitted to me for review pursuant to s. 6 (2) of the Special Judges Act, 1943. This Act was enacted by the Governor of Burma who, by a Proclamation dated the 10th day of December 1942, had assumed to himself all powers vested by or under the Government of Burma Act, 1935, in the Legislature in either Chamber thereof; and Mr. Sastry, who appeared for the respondents, has not only addressed me on the merits of the case but has argued that I have no jurisdiction in the matter as the Special Judges Act, 1943, and in particular section 6 (2) thereof, is *ultra vires* the powers of the Governor.



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Section 139 of the Government of Burma Act, 1935, so far as it is material, is in the following terms :

MOOTHAM, J. " 139. (1) If at any time the Governor is satisfied that a situation has arisen in which the government of Burma cannot be carried on in accordance with the provisions of his Act, he may by Proclamation

(a) declare that his functions shall, to such extent as may be specified in the Proclamation, be exercised by him in his discretion ;

(o) assume to himself all or any of the powers vested in or exercisable by any body or authority in Burma ;

and any such Proclamation may contain such incidental and consequential provisions as may appear to him to be necessary or desirable to give effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Act relating to any body or authority in Burma :

Provided that nothing in this sub-section shall authorize the Governor to assume to himself any of the powers vested in or exercisable by the High Court, or to suspend, either in whole or in part, the operation of any provisions of this Act relating to the High Court,"

and the Proclamation issued by the Governor of Burma on the 10th December 1942 is as follows :

" WHEREAS the Governor of Burma is satisfied that a situation has arisen in which the Government of Burma cannot be carried on in accordance with the provisions of the Government of Burma Act, 1935 (hereinafter referred to as ' the Act ' ) :

NOW, THEREFORE, in the exercise of the powers conferred by section 139 of the Act, the Governor by this Proclamation—

(a) declares that notwithstanding anything to the contrary in the Act all his functions under the Act shall be exercised by him in his discretion ;



- (b) assumes to himself all powers vested by or under the Act in the Legislature of Burma and all powers vested in either Chamber of the Legislature, but not so as to affect any power exercisable by His Majesty with respect to Bills reserved for the signification of His Majesty's pleasure or the disallowance of Acts;

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And he hereby makes the following incidental or consequential provisions which appear to him to be necessary or desirable for giving effect to the objects of this Proclamation, namely :

- (1) the operation of the following provisions of the Act is hereby suspended, namely, sections 5, 6, 12, sub-sections (3), (4) and (5) of section 16, sub-sections (2) and (3) of section 17, sections 18 to 32, inclusive, and 35 to 37, inclusive, sub-sections (1) of section 38, sections 39 and 41 to 43 inclusive, sub-sections (1) and (2) of section 59, sections 60 to 63, inclusive, so much of sub-section (2) of section 67 as relates to the laying of reports before the Legislature, so much of sections 69 to 80, inclusive, and sub-sections (1) and (2) of section 99 as refer to the duties and powers of the Railway Board, sections 119 to 121, inclusive, 153 and sub-section (1) of section 154 ;
- (2) in exercising legislative powers under or by virtue of this Proclamation the Governor, acting in his discretion, shall prepare such Bills as he may deem necessary and declare as respects any Bill so prepared either that he assents thereto in His Majesty's name or that he reserves it for the signification of His Majesty's pleasure ; and the reference in sub-section (2) of section 38 of the Act to the day on which a Bill was presented to the Governor shall be construed as a reference to the day on which the Bill was so reserved by him.

This Proclamation is signed and published at Simla on the tenth day of December 1942."

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The first submission made by Mr. Sastry was that this Proclamation is not a proclamation within the meaning of s. 139 of the Government of Burma Act. He contends that for a proclamation to come within s. 139 it must be a public announcement made to the people of Burma, and that a proclamation issued by the Governor in Simla (and the Proclamation of the 10th December, 1942, was so issued) does not pass this test. In my opinion this argument has no substance. At the time the Proclamation was issued by far the greater part of Burma was in enemy occupation, and the Governor had been compelled by the exigencies of the situation to withdraw to India where the Government of Burma was re-established. The proclamation was published in India in the official *Gazette of Burma*, and in the circumstances it is difficult to see what further publicity could reasonably have been given to it. The word "proclamation" is not defined in the Government of Burma Act, 1935; and in ordinary use means a public announcement, and such, in my view, was the Proclamation of the 10th December 1942.

Mr. Sastry then contended that the Governor had no power to issue a proclamation under s. 139, or to exercise any of the powers which he thereby assumed, unless he was in British Burma both at the time he issued the Proclamation and exercised such powers. He conceded that the words used in s. 139 were wide enough to cover the exercise by the Governor of his powers thereunder whether within or without British Burma, but he argued that it was apparent, when the Act was read as a whole, that those powers could only be exercised by the Governor when within British Burma; and he referred to ss. 18 (2) and



139 (1) (b) and to clause 5 of the 1st Schedule.  
It is an elementary rule of interpretation that

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"When alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system" (1).

I can see nothing in those parts of the Act to which I have been referred which gives rise to the inference upon which the respondents rely, and it appears to me that a construction which will enable the government to continue to function during the period it is ousted from its territory by a foreign invader is to be preferred, as being less likely to cause friction or confusion, to a construction which deprives the Governor of his powers under the Act until after the invader has been repelled and the Governor has returned to British Burma.

The sovereign authority in Burma is His Majesty and the Governor of Burma is His Majesty's representative. Under s. 3 of the Act the Governor has such powers and duties as are conferred or imposed on him under the Act and such other powers as His Majesty may be pleased to assign to him; and under s. 4 the executive authority of Burma is, subject to certain exceptions, to be exercised on behalf of His Majesty by the Governor. The powers conferred and the responsibilities imposed on the Governor, considered in conjunction with his representative character, make it in my opinion reasonable to infer, unless there be specific provision

(1) *Per Lord Shaw in Shannon Realities v. St. Michel (Villede)* (1924)  
A.C. 185, 192.



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in the Act to the contrary, that the Governor is not restricted in the exercise of his powers or the discharge of his responsibilities to such occasions as he is within British Burma. To hold otherwise would mean, for example, that the Governor is, on a voyage from Rangoon to Tavoy, deprived of the powers conferred on him under the Act for such time as his ship is outside territorial waters. In my opinion this contention fails.

It was then argued that in view of the proviso to sub-s. (1) of s. 139 of the Government of Burma Act, 1935, the provisions of sub-s. (2) of s. 6 of the Special Judges Act, 1943, were *ultra vires* inasmuch as (a) the provision in that sub-section that the proceedings before a Special Judge in which a person is sentenced to death shall be submitted for review to a single judge involved a suspension of the law administered by the High Court and, (b), the provision vesting in the Governor the power to nominate the Judge of the High Court who shall dispose of the review proceedings involved an assumption by the Governor of powers vested in or exercisable by the High Court. The proviso to sub-s. (1) of s. 139 of the Government of Burma Act, 1935, provides that nothing in the sub-section shall authorize the Governor to assume to himself any of the powers vested in or exercisable by the High Court, or to suspend, wholly or in part, the operation of the provisions of the Act relating to the High Court; and the learned Government Advocate who appeared for the Crown submitted that this proviso applied only to the Proclamation issued by the Governor under the sub-section and not to legislation enacted by the Governor by virtue of the powers which he had assumed under the Proclamation. The Governor's powers of legislation

were, it was contended, unfettered. I do not think this is so. Sub-s. (1) of s. 139 gives the Governor power in certain circumstances to assume to himself all or any of the powers vested, *inter alia*, in the Burma Legislature; he does so by proclamation, and in my opinion the proviso applies not only to the Proclamation but to the exercise of the powers assumed thereunder.

Now the argument on behalf of the respondents, as I understand it, falls into two parts. It is said that s. 84 of the Government of Burma Act, 1935, is a provision of that Act relating to the High Court; that one of the provisions of that section is that, subject to the provisions of that Act, to the provisions of any Order in Council made under that or any other Act and to the provisions of any Act of the Legislature, the law administered in the High Court shall be the same as immediately before the commencement of the Act; that under Chapter XXVII of the Code of Criminal Procedure a sentence of death passed by a Court subordinate to the High Court must be submitted for review to at least two Judges of that Court, and that, therefore, the provision in sub-s. (2) of s. 6 of the Special Judges Act, 1943, prescribing a review by one Judge, involved the suspension of one of the provisions of the law administered by the High Court and consequently was not within the Governor's powers. This argument appears to me to be unsound. In the first place, Chapter XXVII of the Code of Criminal Procedure refers specifically to the confirmation of sentences of death passed by a Court of Session; the sentences in the present case were passed by a Special Judge (who was not in fact a Sessions Judge) and *prima facie* therefore did not fall within the ambit of that chapter.

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1946 S. 6 (2) of the Special Judges Act, 1943, reads as  
 THE KING follows :  
 2.  
 SIT THEIN " The provisions of Chapter XXVII of the Code shall not  
 AND ONE. apply to sentences of death passed by a Special Judge (but if  
 MOOTHAM, J. in any proceedings before a Special Judge a person convicted  
 is sentenced to death the proceedings shall be submitted for  
 review by a Judge of the High Court nominated in this behalf  
 by the Governor and the decision of that Judge shall be  
 final)."

The opening words of this sub-section do indeed suggest that but for their insertion the provisions of Chapter XXVII of the Code would have been applicable to a trial before a Special Judge, but I am inclined to think that these words were inserted *ex abundanti cautela* as nowhere in the Special Judges Act can I find grounds for inferring that the procedure applicable in the case of a Sessions Trial applies also in the case of a trial before a Special Judge. The procedure before a Special Judge more nearly approximates to that of the trial of a warrant case before a magistrate. In the second place I find difficulty in appreciating the argument that the provisions of sub-s. (2) of s. 6 constitute a suspension of the law administered by the High Court. To suspend means to defer, or temporarily to annul, but again I can find nothing in the Special Judges Act which suspends any of the provisions of the Code of Criminal Procedure as regards the ordinary criminal courts of the land. Courts of Session have not been abolished or superseded, all that has occurred is that a new class of courts, having a procedure of their own, has been established alongside the existing courts. So far as I am aware there is no legal reason why a person may not now be committed to and tried by a Court of Session, and if that Court passes a sentence of death the



latter will be subject to confirmation in accordance with the provisions of Chapter XXVII of the Code of Criminal Procedure. For both these reasons I think this part of 'the respondents' argument is without substance.

The second part of the argument is that by enacting that the proceedings of a Special Judge resulting in a sentence of death shall be reviewed by a Judge of the High Court nominated in this behalf by the Governor, the latter has purposed to assume to himself powers vested in or exercisable by the High Court. The contention is that under clause 34 of the Letters Patent constituting the High Court of Judicature at Rangoon the functions which are to be performed by the High Court may only be performed by such Judge or Division Court as has been appointed or constituted for such purpose pursuant to s. 108 of the Government of India Act, 1919; and sub-s. (2) of s. 108 provides, *inter alia*, that it is the Chief Justice of each High Court who shall decide what Judge in each case is to sit alone. This contention appears to me, however, to overlook the fact that the proceedings of a trial before a Special Judge in which a sentence of death is passed are not submitted to the High Court for review, but to a *persona designata* whose qualification must be that he is a Judge of High Court. S. 374 of the Code of Criminal Procedure specifically provides that certain proceedings of a Court of Session "shall be submitted to the High Court". No such provision is to be found in s. 6 of the Special Judges Act, 1943, and therefore, in my opinion, the provisions of s. 108 of the Government of India Act, 1919, have no application and no question of the assumption by the Governor of a power vested in the High Court arises.

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Having considered the objections taken on behalf of the respondents to the validity of the Special Judges Act, 1943, I have now to refer to a further objection taken by Mr. Sastry, on this occasion to the procedure adopted by the learned Special Judge. It appears from the diary entry of the learned Special Judge dated the 27th December, 1945, that at the conclusion of the prosecution evidence the accused were asked whether they wished to give evidence on oath on their own behalf. This they elected to do, and their evidence was duly recorded; but it was only after the accused had been examined that the charges were framed. The procedure adopted by the learned Special Judge was clearly not in accordance with the provisions of Chapter XXI of the Code of Criminal Procedure, as amended by Burma Act No. XIII of 1945, and Mr. Sastry has contended that the failure of the Court to comply with a mandatory provision of that Code renders the trial void irrespective of whether the accused have thereby been prejudiced. I am unable to accede to this argument. It has been repeatedly held that non-compliance with a statutory rule of procedure does not necessarily render a trial void, and that the test in each case is whether the proceedings have resulted in a miscarriage of justice. In *K.E. v. Nga Po Min* (1) Page C.J., affirming a view which he had expressed in the earlier case of *Emperor v. Erman Ali* (2), said

"The test to be applied, in cases where the prescribed rules of procedure have not been followed, to ascertain whether there has been a mistrial, is always essentially the same, namely, whether there has been a miscarriage of justice; for if the Appeal Court is satisfied in point of fact that the

(1) I.L.R. 10 Ran. 511, 516.

(2) I.L.R. 57 Cal. 1228.

accused has materially been prejudiced by the breach of procedure clearly a failure of justice has occurred; while if, by reason of the breach of procedure, there has in effect been substituted another mode of trial for that prescribed by the legislature as affording the best means of obtaining a fair trial, it is presumed that a fair trial has not been accorded the accused, and in that case also there has been a failure of justice. In either case, therefore, the proceedings *pro tanto* will be set aside upon the ground that by reason of the breach of the rules of procedure a miscarriage of justice has been occasioned." On the other hand, if the Appeal Court is not satisfied that the breach of procedure falls within one or other of those categories, in my opinion, it ought not to hold that the proceedings have become vitiated merely because there has been a transgression of the prescribed rules by which such proceedings are to be regulated. It is ever to be borne in mind that rules and regulations are intended to be the handmaid and not the mistress of the law, and that, in criminal proceedings, it is of the utmost importance that a decision just and reasonable on the merits, should not be disturbed, because in the course of the proceedings some flaw can be detected that is not fundamental, and which is not proved to have worked injustice to the accused, although it may constitute a breach of the rules of criminal procedure."

Now in this case the facts were such that the first accused could not possibly have been in doubt that what he had to face was a charge of murder and the second accused a charge of abetting the first accused in the commission of that murder. There was no doubt as to the identity of the person who had been killed. No prosecution witnesses were recalled after the accused had given evidence, and Mr. Sastry has frankly conceded that neither accused could have been prejudiced by the error in procedure. I am satisfied that no miscarriage of justice has occurred and therefore that the trial has not been vitiated by the procedure which was adopted.

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I now turn to a consideration of the facts.

Khin Saw was killed on the evening of the 9th February 1945. Tawmakon village, where this occurred, was at that time in enemy occupation and the delay in bringing the accused to trial no doubt accounts for some of the discrepancies in the evidence. On the day in question a cart race was being held outside Tawmakon village. At about 4 p.m. the two accused arrived at the place where the races were being held and both were somewhat the worse for liquor. Sit Thein was then a member of the Burma National Army, but he was unarmed and not in uniform. He himself says that he had been sent to the village to supervise an *ahlu* ceremony and that he questioned those who were holding the races as to the authority under which they were acting. Whether this be true or not it is clear that he became involved in a dispute with two men, Ba Tin and Mya Maung, the latter of whom was Khin Saw's brother. Blows were exchanged, and Mya Maung on hearing that the first accused was a soldier of the Burma National Army ran away. Sit Thein then told Tun Yin, the second accused, to go to the neighbouring village of Tawmakyin and bring his, Sit Thein's, rifle. According to Maung Sein Lon (D.W. 4) Sit Thein sent for the rifle in order to impress upon the villagers the fact that he was a soldier.

Tun Yin set off on his errand and Sit Thein went into the village to the house of the ten-house *gaung*, U Tha Hpaung. U Tha Hpaung was not at home, and the first accused waited in his house with some other men. After they had been there for a short while Khin Saw, armed with a *dah*, entered U Tha Hpaung's compound. Immediately upon his arrival Sit Thein ran off in an easterly

direction, followed by Khin Saw. The road taken by Sit Thein led past Khin Saw's house, and when the latter came opposite his house he was intercepted by his wife, Ma Mya Yi. Khin Saw had also been drinking and Ma Mya Yi, fearing that he might come to harm, endeavoured to pull him inside the compound.

In the meantime Sit Thein had reached the outskirts of the village where he met Tun Yin and obtained from him the rifle which the latter had been sent to fetch. At that time Sit Thein had so far outdistanced Khin Saw that the latter was not in sight. Having obtained his rifle Sit Thein accompanied by Tun Yin, Maung Khwe (D.W. 6) and, it appears, by U Tha Hpaung, turned back and re-entered the village.

Up to this point there is little dispute as to the facts, but what subsequently occurred is a matter of controversy. According to the prosecution Sit Thein, accompanied by Tun Yin, went back to Khin Saw's house. When they were near the house Tun Yin pointed out Khin Saw to Sit Thein and urged Sit Thein to shoot him, and that thereupon Sit Thein fired four shots at Khin Saw. The first two shots went astray, but the last two struck Khin Saw respectively on the right thigh and left side. The prosecution then say that the second accused entered the compound and struck Khin Saw, who was lying on the ground, on his back with the butt of his rifle, Khin Saw died shortly after he was shot.

Sit Thein gives a different version of what occurred. He gave evidence on oath, and said that having obtained his rifle from Tun Yin he loaded it, and warned Khin Saw that he had authority to fire on anyone resisting arrest. Khin Saw however ignored the warning, and continued to approach

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him whereupon he fired two warning shots. He then repeated his warning and said that he would really shoot him, but again Khin Saw paid no attention and continued to approach. He then fired a third warning shot, but despite this Khin Saw approached until he was about 5 cubits away and jumped up to cut him with his *dah*; whereupon he fired two shots which brought the deceased to the ground. He made no effort to ascertain where Khin Saw was wounded, but ordered U Tha Hpaung to pick up the deceased's *dah* and accompany him to Kyauksaung. The place he says where Khin Saw fell was 50 or 60 cubits away from his house.

Sit Thein's account of what occurred is not supported, in important details, by a single witness. Tun Yin, the second accused, says that when he returned to the village with Sit Thein's rifle, he met the latter running in his direction. Sit Thein took over the rifle and went back into the village, followed by the second accused and the ten-house *gaung* U Tha Hpaung. He, Tun Yin, saw Khin Saw on the road to the west of his house and Ma Mya Yi pulling him into the compound. When Sit Thein saw Khin Saw he ordered him to drop his *dah*. Khin Saw did not obey, and having succeeded in breaking away from his wife, ran towards Sit Thein who fired two shots in the air and another shot when the deceased came nearer him. Sit Thein then warned the deceased that he would shoot at him if he dared to come forward, and fired another shot in the air. Khin Saw thereupon rushed towards Sit Thein, who fired two shots at him in succession from a distance of about 10 cubits, both of which took effect.

In view of these conflicting accounts clear evidence as to actual place where Khin Saw was



when he was shot would clearly be of the greatest value; but unfortunately this evidence is wanting. The prosecution say that Khin Saw was shot in his compound. Both the accused say that it was on the road and according to the first accused, at a distance of about 50 or 60 cubits away from the house. The learned Special Judge has commented adversely on the evidence of the defence witnesses and I agree with him in thinking that on this point the evidence of the prosecution witnesses is to be preferred. Maung Sein Lon (D.W. 4) said that Khin Saw went about 200 cubits to the north of his house, but in cross-examination he admitted that he had no personal knowledge as to the place where Khin Saw was killed. Maung Pu (D.W. 5) said first that Khin Saw was killed 80 cubits away from his house; but later he altered this to 10 cubits. Maung Khwe (D.W. 6) gives the distance as about 15 cubits. I am satisfied that the deceased was killed near his house, although I am not satisfied that at the time he was actually in his compound. He may have been on the road outside. It follows, therefore, that the first accused re-entered the village and went towards Khin Saw's house. It has been strenuously argued on Sit Thein's behalf that he re-entered the village for the sole purpose of making contact with U Tha Hpaung, and lodging a report with him with regard to the conduct of Mya Maung. I do not, however, think that this is the explanation. It was not advanced by Sit Thein himself, and it is clear from the evidence of both U Tha Hpaung and the second accused that the former was in the company of Sit Thein when he turned back into the village. The first accused had been drinking, he considered that his authority had not been respected and he had, but a short while before, been chased by

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Khin Saw. In the circumstances there can, in my opinion, be little doubt that when he turned back into the village it was with the intention of settling accounts with Khin Saw.

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I have some doubt whether Khin Saw, as alleged by the prosecution, did retire towards his house on Sit Thein's approach. I can find no evidence sufficient to support Sit Thein's story that immediately upon his reappearance he was attacked by Khin Saw; but it may I think be true that Khin Saw did attempt to assault him after, but not before, Sit Thein had fired two shots.

In my opinion the most favourable constructions which can be placed upon the defence evidence is that Sit Thein having armed himself with a rifle, turned back into the village and approached Khin Saw who was then just outside the compound of his house resisting his wife's efforts to pull him inside. When he got near Khin Saw, Sit Thein called upon to drop his *dah*; Khin Saw did not do so and thereupon Sit Thein fired two shots in his direction. Then, but then only, did Khin Saw disengage himself from his wife and approach Sit Thein carrying his *dah*; and Sit Thein shot him dead. It has been contended on Sit Thein's behalf that these circumstances gave rise to the justifiable exercise by him of the right of private defence and that as his life was endangered he committed no offence in killing Khin Saw. In my opinion that was not so. There is no doubt that Khin Saw was the original aggressor; but Sit Thein escaped injury by flight and so far outdistanced his pursuer, who was being prevented by his wife from continuing the chase, that he ceased to be in any danger. He then obtained possession of his rifle and turned back towards Khin Saw. The roles were reversed;

Sit Thein had become the aggressor, at least in the sense that thinking he might be attacked he invited the attack. The right of private defence is one allowed by the law for the purpose only of defence, and no man can plead the exercise of the right unless he acted in good faith. He may not take advantage of the right of private defence to kill with a veneful motive [see *Po Mye v. The King* (1)]. The accused has no legal authority whatever for ordering Khin Saw to throw down his *dah*, still less had he for firing two shots which, for all Khin Saw knew, were aimed at him. Sit Thein was in my opinion determined to assert the authority which he thought he possessed, and to punish Khin Saw for his temerity in chasing him out of the village. I am not satisfied that the right of private defence on the part of Sit Thein arose at all; but if it did arise I do not think that in the exercise of the right Sit Thein acted in good faith. In my opinion, therefore, the finding of the learned Judge that Sit Thein was guilty of murder was right. The crime was however committed during the Japanese occupation at a time when there was much general lawlessness. Sit Thein was then a young man of 21 years. He was a member of the Burma National Army and I have little doubt believed himself to be invested with certain authority in connection with the affairs of the village. It appears also that, as a consequence of this affair, he received 25, possibly 50 lashes, at the hands of the Burma National Army. Nor can, I think, the original provocation given by Khin Saw be wholly ignored; and in the circumstances, I think the case is a fit one for the imposition of the lesser penalty.

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(1) [1940] Ran. 109, 117.



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I therefore set aside the sentence of death and substitute therefor a sentence of transportation for life.

I can find no sufficient evidence to support the conviction of the second accused, Tun Yin.

According to U Tha Hpaung (P.W. 1) it was Tun Yin who pointed out Khin Saw to the first accused, saying "The man pulled by that woman is Khin Saw. Shoot him". There is no evidence to corroborate this statement of U Tha Hpaung, the only other witness whose evidence bears on that point being Maung Khwe (D.W. 6) who says that Tun Yin followed after Sit Thein and "entreated him that Khin Saw should be controlled". It is not clear what Tun Yin meant by this statement, but it cannot, in my opinion, be considered to amount to an incitement to Sit Thein to murder Khin Saw. As there is no other evidence I quash the conviction of the second accused, set aside the sentence and direct that he be acquitted.

## INSOLVENCY JURISDICTION.

*Before Mr. Justice Blagden.*

## IN THE MATTER OF MRS. ANNIE WILSON.\*

1941

June 24.

*Rangoon Insolvency Act, ss. 9 (b) and 9 (c)—Burden of proof on petitioning creditor—No shifting—Fraudulent preference—Dominant motive in debtor's mind criterion—Use of word "fraudulent" misleading and superfluous in s. 9 (c)—Transfer under agreement beyond three months or under pressure or for a substantial advance not preference—Procedure to be followed in Insolvency case.*

*Held*: Subject to the law of insolvency regarding fraudulent preference, a debtor may pay his creditors in any order he pleases.

*Holbird v. Anderson*, 5 T.R. 235, followed. \*

*Held*: Burden of proof of proving fraud in a petition for adjudication under ss. 9 (b) and 9 (c) of the Rangoon Insolvency Act is always on the petitioning creditor. Mere fact that the transferor debtor was seen, after transfer, in transferred property is not sufficient proof of fraud, under s. 9 (b). Under s. 9 (c) the creditor must prove that the dominant motive in debtor's mind was to place the creditor alleged to have been preferred in a better position than other creditors. Knowledge or honesty or the reverse of the creditor is wholly irrelevant. An act may be a fraudulent preference although done from most honest motive or the motive with which ordinary people would sympathize. The word "fraudulent" is completely misleading and superfluous in the section.

*In re Patrick and Lyon, Ltd.*, (1933) Ch.D., page 790, followed.

There is no presumption of fraudulent preference. The onus never shifts from the petitioning creditor. When there is room for more than one explanation, intent to prefer will not be presumed.

*Peat v. Gresham Trust*, (1934) A.C. 262 and *Williams on Bankruptcy*, 15th Edn., page 341, followed.

If there be a binding agreement, more than three months before the presentation of petition which is specifically enforceable against the Assignee, the transfer will not be a fraudulent preference.

*Bulleet and Colmore v. Parker and Bulleet's Trustee*, 32 T.L.R. 661.

Fraudulent preference means a discrimination between creditors and not between one evil and another evil to the debtor and a debtor who pays under pressure is not giving preference. Mere abstention to file a suit, does not by itself prove want of pressure. Where a substantial and not a purely illusory sum is paid for transfer it is difficult to make out a case of fraudulent preference, the natural inference being that the property is being sold in ordinary way for the price.

\* Insolvency Case No. 11 of 1941 of the Original Side of the High Court.

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The question whether dominant motive of the debtor was to prefer is one of fact.

Procedure to be followed in an insolvency case explained.

*P. B. Sen* for petitioning creditor.

*P. K. Basu* for the debtor.

BLAGDEN, J.—This has been a difficult petition involving some unusual points and it has been very ably argued. I feel bound—although I do so with considerable regret—to make an order of adjudication, which I accordingly do now at four minutes past 1 p.m.

I will now proceed to give my reasons.

The dispute before me has centred entirely on the question of whether the debtor, Mrs. Annie Wilson, committed an act of insolvency when, on the 6th December 1940, two days after judgment had gone against her in a suit brought by the petitioning creditor for a vastly greater sum than she was able to pay, she transferred to a Mr. Martin her only asset of any substance, a freehold house, for a consideration of which only Rs. 635 was paid in cash.

The petition also alleged an act of insolvency under section 9 (e) of the Insolvency Act by attachment for a period of not less than twenty-one days, but nothing turns on this, because if the assignment to Mr. Martin was valid the property attached was not Mrs. Wilson's, whereas if the assignment was invalid it was an act of insolvency; and therefore this question did not arise.

The transfer in question is alleged to be either an act of insolvency under section 9 (b) as a transfer with intent to defeat or delay the creditors, or under section 9 (c) as a transfer which would be



void as a fraudulent preference if Mrs. Wilson were adjudged an insolvent.

The circumstances in which the transfer was made were highly suspicious and, though I am deciding against the petitioning creditor as regards 9 (b), I do not want in the least to blame him for having made the allegations that he did.

The first question which I have to decide as regards 9 (b) is whether Mr. Martin, the transferee, was on the 5th December, immediately before the transfer, a genuine creditor of Mrs. Wilson. If he was, it becomes extremely difficult to say that the transfer to him was fraudulent; if he was not, it becomes as plain as a pikestaff that the transfer was of a fraudulent character.

Well, I am satisfied of the genuineness of Mrs. Wilson's debt to Mr. Martin. It is perfectly true that there is no record of it in Mr. Martin's books, but even if so in the case of a loan made outside the ordinary course of business, to a friend, thus not altogether surprising. The promissory notes produced are deleted by the tearing out of a part of Mrs. Wilson's signature, which, apparently was done when her debt was supposed to have been satisfied by the transfer in question; there is nothing surprising in that. I am not prepared to hold that these notes are forgeries. I have seen both Mrs. Wilson and Mr. Martin, and whatever else they are I do not think they are forgers; I am satisfied that they are not.

Well, having decided that there is no doubt of the genuineness of the debt, one has very nearly decided the whole of the question under section 9 (b), because the only possible case in which a conveyance to a creditor can be fraudulent (as it is put in the wider terms of the English Statute in

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question), is where the debtor's real object is to secure a benefit to himself and the creditor or transferee knows that and is party or privy to the fraud. Now that Mr. Martin was a creditor, this case is almost precisely the same as what is perhaps, the leading case for the proposition that subject to the rule about "fraudulent" preference (so-called) a debtor may pay his creditors in any order he pleases, *i.e.* *Holbird v. Anderson* (1). There Charter, being indebted to Shepherd and Holbird, and being sued to judgment by Shepherd (corresponding to Mr. Whitbread), went to Holbird (corresponding to Mr. Martin) and voluntarily gave him a warrant of attorney, on which judgment was immediately entered and execution levied, on the same day on which Shepherd would have been entitled to execution, and had threatened to sue it out. I should here mention that by delivering a writ of *fiery facias* to the sheriff in England the creditor obtains a charge on the debtor's property, which he does not get in this country, Lord Kenyon C.J. said there was no fraud in the case. Holbird was preferred by his debtor, not with a view of any benefit to the latter, but merely to secure the payment of a just debt to the former, in which there was no illegality or injustice.

With regard to the question whether Mr. Martin knew about the judgment, I confess that I feel very doubtful. It does not itself prove fraud in him if he did. Mr. Smith, an obviously honest witness, says that he was present from time to time during the hearing of the suit, and saw Mr. Martin but that he was present on the day the judgment was delivered, and he did not see Mr. Martin in Court on the latter date. The other witnesses, less

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(1) 5 T.R. 235, cited in Kerr on Fraud, 6th edition, p. 289.



obviously honest—though they may be perfectly honest people—spoke to his being present on the day of the judgment.' He is a man of rather striking appearance and it is difficult to imagine that it is possible that there was any mistake about his identity. He himself emphatically denied that he knew anything about it. It is not necessary, in the view that I take of the case, to decide the matter, but I am inclined to accept his denial.

The burden of proving fraud in him (Mr. Martin) rested, of course, on the petitioning creditor, and as I am left in doubt—and I cannot hold that my own doubt is an unreasonable doubt—I must hold that the petitioning creditor has not discharged the burden of proving fraud in Mr. Martin, or even proving as a step towards proving, fraud, the knowledge of the suit against Mrs. Wilson.

With regard to another of what are described in *Twyne's* case (1) as "badges of fraud in conveyances for value", one that was relied on was the transferor's continuance in possession of the transferred property. This is less strong as a badge of fraud in the case of a transfer of land than it is in the case of a transfer of chattels. But, even so, the petitioning creditor was in a position to call before me evidence that months after the transaction Mrs. Wilson was more than once there without a hat—not that that is very important in itself but still without a hat such as you might expect her to have on if she were a visitor on a rather unusually early hour in the morning for a visit. On that evidence, if it had stood uncontradicted, I should certainly have drawn the inference that she continued in possession of part at least of the transferred premises well into 1941. She says that she went

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out very quickly, and she has been able to call before me the lady who very kindly has put her up ever since she went out—Mrs. Lord is the lady—against whose credibility nothing is even suggested and who is, obviously, a witness of truth: she says that Mrs. Wilson was with her by Christmas anyway and I accept her evidence without the slightest hesitation.

Mrs. Wilson's presence in the house when process was served on her is explained to be a coincidence—that she was there on a visit; it is indeed a very remarkable coincidence, but none-the-less it is a coincidence and it must be, if Mrs. Lord's evidence is to be accepted as I am certain it is.

Therefore, I do not think that the petitioning creditor has discharged the heavy burden of proving that this conveyance being a conveyance for value was fraudulent and void as against creditors under sub-section (b) of section 9.

One other piece of evidence which I ought to deal with before parting with 9 (b) is the inference which I am asked to draw from Mrs. Wilson's past conduct in relation to the notes which were the subject-matter of the petitioning creditor's suit and, which eventually turned out, in my judgment, to be his property rather than Mrs. Wilson's property. These notes were released to her by the Court, under an order of my brother Shaw, in which he said that it was not likely that Mrs. Wilson would fritter them away all at once. She did in fact dispose of them absolutely promptly, which looks at first as though she had determined that, come what might, Mr. Whitbread, of whose claim she had notice, should not have them. But what did she do with the proceeds? According to her evidence, which is the only evidence I have got on this

matter and which I do not see any reason to doubt, she paid her then creditors—it turns out that she paid them with Mr. Whitbread's money, but on that date Mr. Whitbread had not established his claim—and with the balance, subject to a few comparatively small gambling losses on the turf, she bought a house. Now, that was not an act of a person who was determined that, come what might, Mr. Whitbread should whistle for his money; because, land, after all, cannot be removed: it is much more likely that she would have bought some easily realizable and transferable asset if such had been her intention. It may have been very wrong of her to pay her creditors with what might turn out and in fact did turn out to belong to Mr. Whitbread, and it may have been very wrong of her to take it to *Kyaik-ka-san*. When she comes to apply for her discharge, the Court will have to consider whether some mild measure of punishment by way of suspension of her discharge may not have to be imposed; I am not going to express any opinion about that now, but as the question has been discussed, I think it is but fair to her to say that I acquit her of actual fraud as regards both the transfer of the house to Mr. Martin and as regards her other dealings with the notes. I am not saying that her conduct was laudable as regards the dealings with the notes at all; it was not: exactly how strongly it should be deprecated will have to be considered later on. At all events, I acquit her of fraud.

Now, I have to deal with the other question of fraudulent preference.

The burden is on the petitioning creditor to prove that the dominant view in Mrs. Wilson's mind was to put Mr. Martin in a better position

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than her other creditors; that is the sole question, and Mr. Martin's knowledge and his honesty or the reverse, are completely irrelevant, as also the motive which inspired the transferor to desire to prefer a creditor, if she did so desire.

Now, how does the matter stand? She must know, and have known for a considerable time, in at least November 1940, that if Mr. Whitbread's suit went against her she could not possibly pay her creditors sixteen annas in the rupee; there was Mr. Whitbread claiming a sum of, I think, about quarter of a lakh; then there was the Rs. 2,000 debt which I have held to be genuine, to Mr. Martin, which was unsecured and of which, incidentally, interest was in arrear; she also owed Mr. Martin a small matter of Rs. 5: over and above that, there was a mortgage to Mr. K. Ba Gyi by deposit of title deeds, to secure a sum of Rs. 4,700. As far as I can make out, Mr. K. Ba Gyi was fully and amply secured. Her only asset was the right to redeem the house charged to K. Ba Gyi; what exactly it was worth, I do not know; the only evidence I have got—that of Mr. David—shows that at all events it was worth more than would be sufficient to pay Mr. Martin; even after paying him, there was some value left, but that, of course, was not enough to pay anything substantial to Mr. Whitbread if he was left in the cold. Moreover, in considering her state of mind it must be taken into account that Mr. Martin was an old friend of hers and it appears, amongst other things, they were on terms of Christian name familiarity; he was a member of her own community and a member of her own religion; and she was a lady who, from her evidence before me, clearly suffered from the erroneous opinion that the only way you



can owe a person money is by borrowing it from him. From that I should draw the inference that she regarded her duty to pay Mr. Martin as a higher duty than her duty to pay Mr. Whitbread if he should recover his judgment. That largely takes away any moral turpitude that a charge of "fraudulent" preference (so-called) may involve, but it does not deprive it of its legal consequences. That an act may be a so-called "fraudulent" preference although it is done from most honest motives is perfectly clear. It was pointed out in *In re Patrick and Lyon, Limited*, (1) by the late Lord Chancellor, that the word "fraudulent" is completely misleading and, indeed, both in our section and in the English one, it is superfluous to the context. He has pointed out there that the motive of the debtor may be one with which most ordinary people will sympathize; for example, it is quite possible, that a debtor might pay his poor creditors and leave his rich ones in the cold because he thinks that the latter can better afford to lose their money; it is none-the-less a "fraudulent" preference within the meaning of the section.

Anyhow, that was the position in November 1940; judgment goes against her and two days later we find that her only asset worth talking about is transferred to Mr. Martin. Of course, I must not take up the attitude that from that any presumption that there was a "fraudulent" preference arises. The House of Lords laid down in *Peat v. Gresham Trust* (2)—*per* Lord Tomlin—that that is wrong. The onus never shifts from the petitioning creditor. But, the House of Lords certainly did not say that I am not, in those circumstances, at liberty to infer that there was a fraudulent preference; what

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(1) (1933) Ch.D. 790.

(2) (1934) A.C. 262.

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Lord Tomlin said in the important part of his speech was this :

" . . . . . but where there is not "direct" evidence and there is room for more than one explanation it is not enough to say there being no direct evidence the intent to prefer must be inferred."

The word "must" ought to be really printed in italics to make the meaning of the passage clear. Reference may usefully be made also to *The King v. Abramovitch* (1) and *Woolmington v. Director of Public Prosecutions* (2) : and to a note in William 15th Edition p. 341 which though a poor thing and mine own has never been held to be wrong :

"Neither unexplained possession of goods recently stolen, nor the fact of homicide committed by the prisoner, compels a jury, even in the absence of evidence for the defence, to convict of receiving or of murder, or shifts the onus from the prosecution to the defence ; but in either case the jury may, not must, convict. It is submitted that precisely the same principles govern the question now under consideration."

Well, I think that these facts establish a case on which I might come to the conclusion that there was a fraudulent preference here.

The points made against that are threefold. One is that on the evidence of Mr. Martin, if I accept it, and Mrs. Wilson, though she was a little less definite as to the date, the transfer of the 6th December was not a new thing done suddenly and spontaneously on that date, but was the result of a preceding agreement. Mr. Martin puts that agreement as being in about the middle of the previous month. The burden of proving that agreement is, of course, on those who assert it, not on those who deny it ; and I am not satisfied that there was

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(1) 84 L.J.K.B. 396.

(2) (1935) A.C. 462.



settling with the creditor who is pressing him he will be able to weather the storm and keep his business going; pressure, in other words, is only effective because it involves a threat to put an end to his commercial career: Mrs. Wilson, as I say, had no business and can have had no reasonable hope that, by surrendering to pressure, she would be doing anything more than putting off the evil day when she would be faced with liabilities infinitely more than she could meet.

Of course, it would also be an answer if it could be shown that she was actuated purely by self-interest, that she really hoped to gain from the transaction, though this would bring it dangerously near actual fraud with which I have already dealt. But in point of fact, I do not think there was any understanding that she should be given any preferential treatment as regards the right to occupy the house and I think what really annoyed her and caused her to take largely unnecessary offence at the notice-to-quit which was given her was that it was written in business terms—addressed to “Dear Madam” and so on—when until the transfer Mrs. Wilson and Mr. Martin had been respectively “Annie” and “Joe”. That being so, I do not think that she was actuated by any desire to secure a benefit to herself.

The most formidable point that has been made against this being a fraudulent preference at all is the fact—and it is a very important fact indeed—that there was an actual fresh cash consideration of Rs. 635 included in the price for which the house was transferred. The whole of the rest of the price was employed in satisfying K. Ba Gyi's mortgage with interest and Mr. Martin's debt with interest: but, there was this further price of Rs. 635.

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Where a substantial sum of money is paid for a transfer, and not a purely illusory sum, it is very difficult to make out a case of fraudulent preference; the natural inference to draw is that the property is being sold in the ordinary way, and that what actuates the vendor is the desire to get the price. But here, as in every other case, the question whether the transferor's dominant view was to prefer is one of fact; and though in general payment of money ousts the inference that the intention was to prefer, there is no rule of law that that is so. The question, as I say, is one of fact and one must apply the same reasoning that one does to the question of pressure. As I say, if the debtor's position is so hopeless that mere abstention from bringing a suit on the part of the creditor preferred will make no real difference to his position—of which, by the way, there is a good instance to be found in *Ex parte Hall* (1)—pressure counts for nothing. Equally I must, in considering the question of payment of money, consider the dimensions of the payment in relation not only to the debt or debts satisfied by the transfer, but also to the other debts and to the debtor's position generally.

She might have been and, no doubt, was, very glad of the Rs. 635 at the moment she got it; but, supposing Mr. Martin had been adamant and said, "No, I will give you no more than the satisfaction of my debt and the satisfaction of K. Ba Gyi's debt: in other words, I take the right to redeem the house: I relieve you of all your debts in the world except Mr. Whitbread's, but I will not pay you any money"—supposing that had happened—I have to ask myself, should I infer that Mrs. Wilson would

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(1) (1881) 19 Ch.D. 580.

have said "Nothing doing," and would have waited Mr. Whitbread's on-slaught, whatever form it took : I do not think she would have done that. Holding the view she did as to the moral duty she owed to Mr. Martin as against Mr. Whitbread, namely, that her obligation to him was a higher obligation than a judgment debt of this Court, and bearing also in mind that he was an old friend and a member of her own community and religion while Mr. Whitbread was a complete stranger, I think that, if Mr. Martin had been adamant and said "not one anna more than the satisfaction of my debt", she would have said, "Oh, all right, then take it". I do not believe that it was Rs. 635 which really actuated her. That means that there was, in my view, a transfer with a dominant view to prefer Mr. Martin, and therefore an act of insolvency.

There is no doubt that the other conditions of the Act are satisfied ; there is a judgment debt easily enough to support the petition ; there is no dispute really as to whether the debtor lived within the jurisdiction, and there is no dispute that she is not a married woman ; and as no other sufficient cause had been shown why the order of adjudication should not be made—and it is admitted that she cannot pay her debts—I am bound to make the order ; I have said that I do so with regret and I repeat it, because I still think that in this matter Mrs. Wilson has been the victim of circumstances, as also Mr. Whitbread : they are both sufferers from a third party's fraud. Still, Mr. Whitbread got his judgment and he must be entitled to follow it up.

There is one other matter which I am asked to mention ; though it has not caused any difficulty in this case, it may do in others : that is this, Petitions for adjudication are quasi-criminal

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proceedings, both because of the penal effect the adjudication may have on the debtor and because the interests not only of the contesting parties but also those of the public are affected by the result. It is, therefore, important that the principle should be observed that it is for the petitioning creditor to make out a *prima facie* case by adducing evidence—oral or affidavit—other than the mere formal affidavit on which the petition is issued—before the debtor is called upon (so to speak) to “enter on his defence”. This means observing, I believe, a new practice in this country, but the matter is of special importance now that our rules have been closely assimilated to the English rules, see *Re Cohen* (1) to which reference is made in another connection, but it has not been overruled on this point; it applies especially to petitions for adjudication because of their quasi-criminal character.

I desire to make it clear that where the debtor files an affidavit in opposition to the petition it may not be read or referred to for any purpose whatsoever until the debtor or his advocate elects to read it; it should be regarded, till then, as a defence witness in a criminal case, whom the defence may or may not call.

This does not apply to a notice filed by a debtor under the new Rule 117. The petitioning creditor is perfectly entitled to point out that such and such an allegation in his petition is not disputed in that notice.

Where default has been made in filing such a notice and the debtor intimates that he wants to dispute the petition, the petitioning creditor is entitled, if he chooses, to ask for an adjournment

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(1) (1924) 2 Ch.D 515.



in order that the rule may be complied with. Such an adjournment should be granted as a general rule on the terms that its costs are to be paid by the debtor even if the petition is ultimately dismissed.

I have been asked by counsel for both sides to deal in my judgment, with the practical difficulty in which the rule of practice I have just enunciated places a petitioning creditor where he relies on a transfer effected by an attested document as an act of insolvency—either as a fraudulent transfer or as a so-called “fraudulent” preference. It is pointed out that the transferee is interested in opposing the adjudication and that in more cases than not the attesting witness or witnesses, one at least of whom if available the petitioning creditor is obliged by section 68 of the Evidence Act to call, are likely to be in the same camp.

The first question, it seems to me, is whether the document is required by law to be attested. If the attestation is voluntary, there is no great difficulty—see section 72 of the Evidence Act. The petitioning creditor himself or someone else whom he can safely call may be able to recognize and depose to the debtor's signature; or, if there has been a suit, the signature to the document in question may be compared with the signature to the written statement; or, the signature may be proved by any other legitimate means, and in the case of a deed once the signature of the transferor is proved, it seems reasonable in the absence of evidence to the contrary to infer under section 114 of the Evidence Act that the deed was delivered by the transferor.

If, on the other hand, the document is one required by law to be attested, the next question

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is whether it is registered—see proviso to section 68 of the Evidence Act.

If it is, one should look to the debtor's notice to dispute, if any; if that specifically denies the execution of the document, one is in the same position as if the document were not registered. If not, or if there is no notice to dispute and the Court is satisfied that the petition was duly and personally served, there is an admission of execution under section 70 of the Evidence Act and again no difficulty arises.

I do not for a moment say that the Court should make an order of adjudication on that admission alone. Once again, insolvency is a matter affecting the public and the Court owes a duty to satisfy itself by evidence that all the requirements of the Insolvency Act and Rules have been fulfilled. A mere admission by the debtor on a petition by a creditor is insufficient for this purpose—*Re A Debtor* (1) especially an admission by mere non-denial. But there is at least, I think, an admission sufficient to relieve the petitioning creditor of the burden imposed on him by section 68 of the Evidence Act.

If the document is not registered, again the absence of a notice to dispute, or failure in that notice to dispute the execution, will bring section 70 of the Evidence Act into operation. Consequently, the difficulty should really only arise in a limited number of cases and those are cases where the document is disputed in the notice to dispute and is required by law to be attested. Here, if the attesting witnesses prove hostile, section 71 of the Evidence Act, I think, provides the way out. It clearly shows that a denial by the attesting

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(1) (1935) 1 Ch.D. 353.

witness is not' conclusive against the party who compulsorily puts him in the box. If he does deny the fact of execution, other evidence may still be adduced as if the document were not by law required to be attested. It is true his denial may be a valuable matter of comment to the debtor, but Courts are usually not slow to detect whether such a denial is or, is not perverse.

Stay of advertisement for fourteen days, and if notice of appeal is given within that time, then till after hearing of the appeal or further order ; advocate's fee thirty gold mohurs.

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## APPELLATE CRIMINAL.

Before Mr. Justice Ba U and Mr. Justice Wright.

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May 25.

## THE KING v. HLA MAUNG.

*Evidence Act, s. 24—Confession of accused—"Appears" to court to be inducement, etc.—Something less than proof—Retracted confession—Admissible—Conviction based on retracted confession legal—But prudence should require corroboration.*

*Held* : Under section 24 confession would not be relevant if the making of confession appears to the Court to have been caused by inducement, threat, etc. The phrase "appears to the court" shows that something less than positive proof in the nature of a well-grounded conjecture or probability though not a mere possibility, that the confession is not voluntary, is sufficient.

*The King v. San Min* [1939] Ran. 97 ; *Khiro Mandal v. The King*, I.L.R. 57 Cal. 649 ; *Emperor v. Panchkowi Dutt*, I.L.R. 52 Cal. 67 ; *Emperor v. Nazir and others*, I.L.R. 55 All. 91 ; *Hashmat Khan v. The Crown*, I.L.R. 15 Lah. 856, followed.

A retracted confession is admissible in evidence.

*Q.E. v. Basvanta*, I.L.R. 25 Bom. 168 ; *Q.E. v. Raman and others*, I.L.R. 21 Mad. 33 ; *Emperor v. Kehri and others*, I.L.R. 39 All. 434, followed.

The weight to be attached to a retracted confession must depend upon circumstances of each case. There is no law which prevents conviction being based upon an uncorroborated retracted confession but ordinary rule of prudence is that some kind of corroboration is required unless the circumstances are exceptional.

*Q.E. v. Basvanta*, I.L.R. 25 Bom. 168 ; *Q.E. v. Jadub Das*, I.L.R. 27 Cal. 295 ; *Q.E. v. Maiku Lal and another*, I.L.R. 20 All. 133 ; *Q.E. v. Gharva and others*, I.L.R. 19 Bom. 728, followed.

*Chan Tun Aung* (Government Advocate) for the applicant.

*Sanyal* for the respondent.

WRIGHT, J.—Hla Maung has been convicted by U Maung Gale (2), Special Judge, Mandalay, under section 302 of the Penal Code, of the murder of Hla Pe. The case is before us under section 6 (2) of the Special Judges Act, 1943.

\* Criminal Reference No. 3 of 1946 [Criminal Review No. 73 (S.J. Act) of 1946]. Review of the order of U Maung Gale (2), Special Judge of Mandalay, dated the 30th day of January 1946, passed in Criminal Regular Trial No. 7 of 1945.

This case was originally before Mootham J. who, in his order, dated the 25th March, 1946, directed that a searching enquiry should be held into the allegations of Hla Maung that his confession was not voluntary and had been obtained by ill-treatment. Additional evidence has now been taken and certified to this Court. We have heard Counsel for Hla Maung and the Crown on the case as a whole including the fresh evidence.

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The case for the prosecution is that the deceased, Hla Pe, was suspected by certain persons of being concerned in the theft of a box of revolvers which had been obtained for the Burma Defence Army, and that on this account, the two accused, Hla Maung and Maung Saung (Maung Saung has been discharged) were directed to kill him. On the morning of the 29th April, 1945, there was an *ahlu* at Banaw, and the deceased, Hla Pe, set out early from his village, Leiksangun, to attend it. On his way back he was attacked and cut to death by Hla Maung and Maung Saung who robbed him of his possessions.

The prosecution case rests upon Hla Maung's confession and evidence that he was in possession of a ring which was worn by the deceased at the time of his murder.

The accused Hla Maung denies taking part in the crime and alleges that he was elsewhere at the time. He contends that he gave the confession, which he says is untrue, owing to ill-treatment by the Police. He alleges that he obtained the exhibit ring as his share in the proceeds of some dacoity.

The first point for determination is whether Hla Maung's confession, which he retracted before the Special Judge, is admissible.

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The law on the question is contained in section 24 of the Evidence Act which is in the following terms :

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" A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

It is important to consider the effect of the words "appears to the Court to have been caused by". The word "appears" was considered by Ba U J. in the case of *The King v. San Min* (1) where he stated :

" From this history it will become quite apparent why the Legislature used the word 'appears' in section 24 of the Evidence Act. It was to provide a safeguard in the interests of accused persons. It connotes less positive proof. If it appears to the Court from the circumstances of a particular case that the confession has not been made voluntarily it must be rejected as irrelevant."

A similar view was taken by the Calcutta High Court in the case of *Khiro Mandal v. The King* (2).

The effect of this wording in section 24 of the Evidence Act was also considered by Mukerji J. in the case of *Emperor v. Panchkowri Dutt* (3), who said in this connection that a duly recorded confession "will be admitted in evidence, subject to the provisions and restrictions contained in section 24 that under the latter section, a well-grounded conjecture, reasonably based upon circumstances disclosed

(1) [1939] Ran. 97.

(2) 57 Cal. 649.

(3) 52 Cal. 67.



in the evidence, is sufficient to exclude the confession, because it would be idle to expect the accused to prove the inducement, threat or promise ; for in most cases such proof cannot be available."

A similar view has been taken in Allahabad and a Bench of that Court in the case of *Emperor v. Nazir and others* (1) stated :

"It has been held in numerous cases that if circumstances create a probability in the mind of the Court that the confession was improperly obtained, it should be excluded from evidence."

The Lahore High Court in the case of *Hashmat Khan v. The Crown* (2) pointed out that the mere possibility of there having been some inducement is not sufficient to render a confession irrelevant under section 24 of the Evidence Act.

It follows from these cases that, a Court should reject a confession under section 24 of the Evidence Act if there are grounds on which to base a sound conjecture that it was not voluntary. Although a mere possibility that the confession was not voluntary is insufficient to warrant its rejection, a probability would suffice.

Hla Maung's confession was retracted. It is settled law that the mere retraction of a confession is not sufficient to render it inadmissible. The admissibility of a retracted confession is a matter for decision in each case according to the evidence, —vide the cases of *Queen-Empress v. Basvanta and others* (3), *Queen-Empress v. Raman and others* (4) and *Emperor v. Kehri and others* (5).

I will now turn to the evidence and the circumstances in this case to see whether in the light of the

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(1) 55 All. 91.

(3) 25 Bom. 168.

(2) 15 Lah. 856.

(4) 21 Mad. 33.

(5) 29 All. 434.

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law referred to above, Hla Maung's confession should be rejected under section 24 of the Evidence Act.

The confession is exhibit E. It was recorded in the form which is usual under section 164 of the Code of Criminal Procedure, and bears the required certificates, although under section 14 of the Courts (Emergency Provisions) Act, 1943, the operation of Chapter XIV of the Code of Criminal Procedure has been suspended, and under rule 9 framed under the Act, any Magistrate may record any confession in such manner as in his opinion is best suited to the circumstances of the case.

The accused, Hla Maung, when he was examined as an accused before the remand stated :

"I made the confession as the Police Officers from Singaing Police Station ill-treat and beat me." The statements in the said confession are not at all correct. \* \* \* It is the statement made as tutored by Sub-Inspector of Police, U Than."

Before the remand one witness, Maung Soe Paing (D.W. 4) was examined to support him on this point. In this connection, this witness stated :

"On the day he arrived Hla Maung was beaten by P.C. Ko San Tint, and P.S.I. U Ba Chit. They continued beating him for 2 or 3 days more. \* \* \* I saw an abrasion on the wrists of Hla Maung."

On these statements Mootham J. ordered further evidence to be taken and in particular he directed that U Than, U Ba Chit and Maung San Tint should be examined. It will be well to note at this stage that prior to the confession of Hla Maung being recorded, he was detained in custody at Singaing Police Station; whereas the offence which is the subject matter of this case took place within the jurisdiction of the Myitngè Police Station.



U Than (P.W. 10) is Sub-Inspector of Police, Singaing. He stated on recall that he did not know of any ill-treatment of the accused and found no injury on him. U Ba Chit (P.W. 16) is P.S.I., Singaing, and when he was examined after remand he denied beating Hla Maung, said that he did not see San Tint beat him, and that he received no report of any kind as to the ill-treatment or torture. San Tint is a Police Constable at Singaing. When he was examined after remand he denied that he assaulted Hla Maung or that he knew anything about such assaults. There is nothing in the evidence of these three witnesses which lends any support to the accused's allegation that he was ill-treated by the Police.

After remand the accused chose to give evidence and he then stated that he was beaten by U Thein Maung, P.S.I., Myitngè, and U Tint, Head Constable of Myitngè at Singaing Police Station. It appears therefore that the accused has entirely altered his allegations as to the persons who assaulted him since he was originally examined as an accused and since the evidence of U Than, Ba Chit and San Tint was recorded. I may mention that when U Thein Maung (P.W. 15), P.S.I., Myitngè, was examined originally (he was not examined after remand in this case), no questions were put to him suggesting in any way that he had ill-treated the accused. U Thein Maung was examined in the connected case (Criminal Reference No. 4 of 1946) after remand and stated that U Tint was dead. After remand Soe Paing was recalled and an additional witness, Tun Khin (D.W. 7) was also cited to prove the ill-treatment. Soe Paing (D.W. 4) on the second occasion stated that Ko San Tint tied the hands of Hla Maung and suspended him, while

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U Thein Maung and Ba Chit beat him in turns. On the first day of the torture he refused to confess but on the second day after the ill-treatment he said that he would confess. It is noteworthy that Soe Paing has on his second appearance in the witness box introduced the name of U Thein Maung for the first time and that his version of the affair is that the beating was on two separate days, while the accused's story in his own evidence is that the two beatings were on the same day. Tun Khin (D.W. 7) says that Ko Tint and U Thein Maung tied the hands of Hla Maung and suspended him and then they both beat him with a rubber rod. He does not mention Ba Chit. He also refers to the torture being repeated in the same way two or three days later. In addition to the points to which I have called attention, there are other discrepancies between the evidence of the accused and his witnesses as to the ill-treatment. The accused appears to me to have made entirely inconsistent statements and the evidence in support of his allegations of ill-treatment is, in my opinion, entirely unreliable. According to the defence the accused received visible injuries on his wrists as a result of being tied up and one would expect the Magistrate, who recorded the confession, to have noticed such injuries, if in fact, they had existed. I entirely reject the accused's story that he was ill-treated and forced to give an untrue confession.

It is urged before us that even if we reject the defence evidence on this point, we should from the circumstances as a whole, come to the conclusion that the confession was not a voluntary one; in particular, our attention was directed to the fact that the accused was detained in custody for a considerable period before he made his confession.

This is not the only case in which the accused is alleged to have been concerned. The accused was arrested at Myingyan on the 22nd July, 1945. He was brought to Singaing Police Station on or about the 26th July, 1945. On the 28th July, according to U Than (P.W. 10) the accused told him that he had entrusted some jewellery with Hla Mu at Zidaw, and as a result of this, jewellery was seized from Hla Mu, including the exhibit ring, and this was brought to Singaing Police Station on the 29th July, 1945. U Thein Maung, P.S.I., Myitngè, who was responsible for this case, heard about Hla Maung's arrest and visited Singaing Police Station on the 3rd August, 1945. He then examined Hla Maung and sent him up to the Township Magistrate, Singaing, on the same day to have his confession recorded, and it was on this day that Hla Maung gave his confession, exhibit E. It appears to me therefore that satisfactory reasons have been put forward to explain the delay which took place between the time of Hla Maung's arrest and the time that he gave his confession before a Magistrate at Singaing, and I do not think that any inference adverse to the prosecution should be drawn from this delay.

Our attention is also drawn to the fact that after Hla Maung had made his confession he was remanded to Police custody at Myitngè. In normal circumstances, this would have been most unsatisfactory and might have raised suspicion, but as conditions were in July, 1945, it would not be feasible to send him to a Jail without considerable delay and trouble. I do not therefore think that his remand to police custody affords any good reason for supposing that Hla Maung may have been induced to make a confession.

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Therefore, after considering all the circumstances and the evidence in this case, I do not think that there are any good grounds on which a conjecture could reasonably be based that the accused's confession was caused by inducement or threat, and I would therefore agree with the learned Special Judge that the confession, although retracted, should be admitted in evidence.

The weight to be attached to a retracted confession must necessarily depend upon the circumstances of each case. There is no law which prevents a conviction being based upon an uncorroborated retracted confession, but the ordinary rule of prudence is that some kind of corroboration is required unless the circumstances are exceptional,—*vide* the cases of *Queen-Empress v. Basvanta and others* (1), *Queen-Empress v. Jadub Das* (2), *Queen-Empress v. Maiku Lal and another* (3), and *Queen-Empress v. Gharva and others* (4).

Now, in the present case, the evidence does afford a certain amount of general corroboration of the accused's confession. In the confession the accused stated that it was on return from the *ahlu* at Banaw that he cut the deceased; while according to the first information report, exhibit A, the deceased was killed on his return from the *ahlu*. According to the confession, the deceased was cut on the road between Leiksangun and Banaw near a pagoda, and this is supported in general by the evidence of Maung Mo (P.W. 1) and Maung Po (P.W. 6). According to the confession, the deceased was given one cut by Maung Saung on the neck and another cut on the neck by Hla Maung, while the medical

(1) 25 Bom. 168.

(2) 27 Cal. 295.

(3) 20 All. 133.

(4) 19 Bom. 728.



evidence shows that there was a very severe cut on the neck and another one on the right temporal bone and the right ear, which is in the neighbourhood of the neck.

On one point there is a distinct divergence between the confession and the evidence. In the confession it is stated that the occurrence took place at about noon; whereas from the evidence it appears that the deceased was cut somewhere about 8-30 a.m. Country people are very vague as to times, and I do not think that much weight should therefore be attached to this discrepancy.

Apart from the general corroboration of the confession, there is specific corroboration with regard to the exhibit ring, which apart from corroborating the confession, connects the accused directly with the crime. When the accused made his confession, the exhibit ring was produced and shown to him and he stated in his confession that after Hla Pe had been killed, he took the exhibit ring from his finger. His present case is that this ring was obtained by him from a man, who is now dead, Ba Kyawt, as his share in a dacoity at Paleik. Soe Paing (D.W. 4) gives evidence tending to support this, but I think that his evidence was undoubtedly correctly rejected by the learned Special Judge. The position, therefore, is that the accused was undoubtedly in possession of this exhibit ring and that he has not offered any acceptable explanation as to how he came to be in possession of it. According to the prosecution witnesses, and there is no reason to suspect their evidence, this ring was seized from Hla Mu on the 29th July, 1945, who had received it a few days earlier from the accused. Thus the accused has been shown to be in possession of the ring within three months of the

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murder. In view of the nature of the property, this can be deemed to be recent possession.

The question that arises is whether the exhibit ring has been satisfactorily proved to have been the one which was worn by the deceased at the time that he met his death.

In the first information report, exhibit A, which was lodged on or about the 30th April, 1945, it was stated that the deceased, Hla Pe, carried with him at the time of the occurrence, a "diamond pattern ring". Maung Bo (P.W. 6), who is the brother of the deceased, says that the exhibit ring is his which he lent to the deceased to wear to the *ahlu*. He says that it was bought from U San of Leiksangun for Rs. 225. He says that he can identify it by a scratch on the socket and by its size and shape. Maung Gale (P.W. 7), is the brother-in-law of Maung Bo. He says that he was present at the time the ring was purchased, that he could identify the exhibit ring as Maung Bo's property by the scratch on the socket and the shape and size. He admits that the shape is common. An identification parade of the exhibit ring was held by U Kywe (P.W. 11), who showed the two witnesses five similar rings including the exhibit and he says that they satisfactorily identified the exhibit. At the time a note was made,—*vide* exhibit C. According to this, Maung Bo identified the ring by its size, its distortion and some dots of colouration on the stone; while Maung Gale picked it out by its design, "*mweyoe*", its distortion, and a file mark near the socket in addition to other marks. It will be seen that the reasons which the witnesses gave in Court for identifying the ring do not precisely coincide with those given in exhibit C, but I do not think they are so much at variance as to



suggest that the witnesses are likely to have been mistaken about the identity of the ring. In actual practice a person often identifies an article by several means, but only mentions some of them unless very carefully examined. It is noteworthy that the person from whom the ring is said to have been bought, namely, U San was called as a witness by the defence. He stated in his examination that he sold a ring like the exhibit to Ma Hla Kyu, who is the mother of Maung Bo, for over Rs. 200. He says that he cannot swear to the exact identity of the exhibit, but that it is like the one which he sold. His evidence therefore lends some support to the prosecution case.

Taking this evidence as a whole, I consider that the learned Special Judge was amply justified in coming to the conclusion that the exhibit ring had been proved to be the ring which was worn by the deceased at the time he met his death.

There is, therefore, against the accused his own confession which gains some general support from the other evidence and particular support in respect of the exhibit ring. The evidence shows, moreover, that the exhibit ring was in the possession of the accused fairly recently after the crime and that this ring was worn by the deceased at the time of his death. These points together clearly implicate the accused in this crime.

The evidence as to the accused's alibi has not been relied on before us and it was undoubtedly correctly rejected in the trial Court.

The medical evidence shows that both the cuts on the deceased's head and neck were very serious, one of them being necessarily fatal, and the other sufficient in the ordinary course of nature to cause death and, in such circumstances, the offence

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injury was caused by the accused.

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extenuating circumstances. The accused's age is 26.  
WRIGHT, J. I would, therefore, confirm the conviction and  
sentence of death passed upon Hla Maung.

Ba U, J.—I agree.

## CRIMINAL REVISION.

*Before Mr. Justice Ba U.*

P. K. MADAVAN

v.

THE KING (P. KANARAM).\*

1946

July 25.

*Code of Criminal Procedure, s. 144—Imminent danger of breach of the peace arising out of a dispute concerning any land or water or boundaries thereof—Jurisdiction of Magistrate—Code of Criminal Procedure, ss. 107, 145.*

*Held:* If there is an imminent danger of the breach of the peace arising out of a dispute concerning any land or water or the boundaries thereof, a Magistrate of competent jurisdiction has power and authority to take immediate steps and issue necessary order under section 144 of the Code of Criminal Procedure. He may even resort to section 107 of the Code of Criminal Procedure if he is one of the Magistrates duly empowered thereunder.

Magistrate can open proceedings under section 145 of the Code of Criminal Procedure in supersession of order, already passed either under section 144 or 107 of the Code of Criminal Procedure and take appropriate steps.

*Shebalak Singh v. Kamaruddin Mandal*, I.L.R. 2 Pat. 94; *Emperor v. Abbas*, I.L.R. 39 Cal. 150, referred to.

*Tun Aung* for the applicant.

*Chan Tun Aung* (Government Advocate) for the respondent.

BA U, J.—The applicant, P. K. Madavan, is one of the Indians who evacuated to India a few months before the outbreak of the war in the Far East in 1941. He came back to Burma in or about the first week of April this year. On arrival, he went to the hotel called "Brahman Hotel" at No. 753M, Dalhousie Street, Rangoon, and demanded

\* Criminal Revision No. 22B of 1946 against the order of the Western Subdivisional Magistrate, Rangoon, dated the 13th May 1946, passed in his Criminal Miscellaneous Trial No. 71 of 1946.

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possession of it from the respondent P. Kanaram. Kanaram refused to part with the possession of it; whereupon Madavan went to the Lanmadaw police station and made a report, alleging that he was the owner of the hotel, that Kanaram was his agent left behind in charge of it when he went away to India in 1941 and that Kanaram had now refused to hand over possession of the hotel to him. On the same day Kanaram went to the same police station and made a report, alleging that he was the owner of the hotel in question and that Madavan had been interfering with his possession of it. On receipt of these reports Mr. Boon Kheng, Inspector of Police in charge of the Lanmadaw police station, started making enquiries. He then submitted a report to the District Magistrate, praying that an order under section 144 of the Code of Criminal Procedure might be passed in order to prevent an imminent breach of the peace. The report was sent by the District Magistrate to the Western Subdivisional Magistrate for disposal. The Western Subdivisional Magistrate then sent for Mr. Boon Kheng and examined him. Mr. Boon Kheng stated on oath that there was a dispute going on between Madavan and Kanaram regarding the possession of the aforesaid hotel and that, as both sides had a large following each, there was every likelihood of the breach of the peace unless immediate steps were taken to prevent it.

On the statement of Mr. Boon Kheng, the Magistrate passed an order under section 144 of the Code of Criminal Procedure directing the applicant Madavan to "abstain from occupying the Brahman Hotel, No. 753, Dalhousie Street, Rangoon, and from committing any act or commission that is likely to cause a breach of the peace in Dalhousie



Street and neighbouring places over the tenancy of the said hotel.

On receipt of the order, the applicant Madavan appeared in Court with his lawyer and asked that the other party should be served with a similar order to keep the peace. The Magistrate agreed and directed the other party, *i.e.* the present respondent, to appear in Court. On the date fixed both the parties appeared with their lawyers. On their statements the Magistrate found as a fact that the respondent Kanaram had been in possession of the hotel in question since 1942. He accordingly confirmed his previous order.

The case has, therefore, been brought up to this Court for revision. The main grounds urged are that the Magistrate erred in taking proceedings under section 144 instead of section 145 of the Code of Criminal Procedure and that the Magistrate erred in not given an opportunity, as he should under sub-section (5) of section 144, to the applicant to show cause against the police report.

In support of the first point, the learned advocate for the applicant submits that in a case where there is a dispute likely to cause a breach of the peace concerning any land or water or the boundaries thereof, the Magistrate should take proceedings under section 145 and not under section 144 of the Code of Criminal Procedure, and, if he takes proceedings under the latter section, the said proceedings are null and void. In so submitting the learned advocate seems to think that the Magistrate has no jurisdiction to take proceedings under section 144 of the Code of Criminal Procedure even in a case where he finds that the dispute relating to any land or water or the boundaries thereof is likely to lead to an imminent breach of the peace. If the

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heading of Chapter XI of the Code of Criminal Procedure is taken into account, it will be seen what the intention of the Legislature was in framing this Chapter. The intention was to arm Magistrates with such power and authority as to enable them to take immediate steps to prevent an imminent breach of the peace. This intention is made clearer by the wording of section 144. It is of wide and general application. If, therefore, there is an imminent danger of the breach of the peace arising out of a dispute concerning any land or water or the boundaries thereof, a Magistrate of competent jurisdiction has power and authority to take immediate steps and issue necessary order under section 144 of the Code of Criminal Procedure. If he thinks that an order under section 107 of the Code of Criminal Procedure will be more effective than the one under section 144, he has jurisdiction to resort to that section, provided he is one of the Magistrates duly empowered thereunder. Section 107 is also, like section 144, of wide and general application in that it is designed to meet urgent cases of the apprehended danger of the breach of the peace. If, after passing an order either under section 144 or 107 of the Code of Criminal Procedure, or in the course of the proceedings taken under either of those two sections, the Magistrate finds that the dispute between the parties is in respect of any land or water or the boundaries thereof and that it is really a *bona fide* one and not a mere pretence as to possession, as in this case, the Magistrate can open proceedings under section 145 of the Code of Criminal Procedure in supersession of order, if already passed either under section 144 or 107 of the Code of Criminal Procedure and take such appropriate steps as

are indicated therein. See *Shebalak Singh v. Kamaruddin Mandal* (1) and *Emperor v. Abbas* (2). 1946  
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In the present case, the police report showed that the respondent was in possession of the hotel in question since 1942 and that it was the applicant who was interfering with the respondent's possession thereof. As both parties had a large following each, there was undoubtedly a likelihood of an imminent breach of the peace. The Western Subdivisional Magistrate was consequently fully justified in taking proceedings under section 144 of the Code of Criminal Procedure.

As regards the second point, there is no substance in it. The Magistrate complied fully with the requirements of sub-section (5) of section 144 of the Code of Criminal Procedure in that he heard not only the applicant and his lawyer but also the respondent and his lawyer on the date fixed. For all these reasons I dismiss the application.

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(1) 2 Pat. 94.

(2) 39 Cal. 150.



## CIVIL REVISION.

*Before Mr. Justice Thein Maung.*

1946  
 May 8.

MAUNG SEIN

v.

BHAGWANDAS BAGLA BY HIS AGENT  
 SOORAJMALL.\*

*Distress warrant—A right and not a decree or order of a Court—Rangoon City Civil Court Act, s. 22—Liabilities (War-Time Adjustments) Act, 1945, s. 3.*

*Held* : Distress is a right ; and an applicant for a distress warrant is not trying to execute or otherwise enforce any decree or order of any Court in applying for distress warrant. Liabilities (War-Time Adjustments) Act, 1945, section 3 does not apply to an application for a distress warrant under section 22 of Rangoon City Civil Court Act and leave of the Court is not required for its enforcement.

*U Kyaw* (2) for the applicant.

*Sastry* for the respondent.

THEIN MAUNG, J.—The only question for decision in this case is whether an application for a distress warrant under section 22 of the Rangoon City Civil Court Act can be made without the applicant having received the leave of the Court, *i.e.* of this Court under section 3 of the Liabilities (War-Time Adjustments) Act, 1945, which has admittedly been in force in Rangoon since the 1st November, 1945.

The learned Chief Judge of the Rangoon City Civil Court has held that section 3 of the (War-Time Adjustments) Liabilities Act, 1945, does not apply to an application for a distress warrant and I agree with him. Section 3 of the said Act reads :

“Save as provided by this Act, no person shall be entitled, except with the leave of the Court, to execute or otherwise

\* Civil Revision No. 2 of 1946 from the order of the Chief Judge, Rangoon City Civil Court, in Civil Distress No. 4 of 1946, dated the 11th March 1946.

enforce any decree or order of any Court (whether made before or after the commencement of this Act), for the payment or recovery of money."

Now an applicant for a distress warrant is not trying to execute or otherwise enforce any decree or order of any Court in applying for a distress warrant. There is no decree or order in his favour which he can execute or enforce as yet. He is merely exercising his right of distress in the manner provided by section 22 of the Rangoon City Civil Court Act. Section 3 does not require any leave of the Court for enforcement of any right, statutory or otherwise. It requires the leave of the Court only to execute or otherwise enforce any decree or order of any Court for the payment or recovery of money.

It has been contended by the learned Advocate for the applicant that a distress warrant being issued has the same effect as execution of a decree or enforcement of an order. That may be so but the Courts have to administer justice according to law and the law as contained in section 3 is quite clear.

The application for revision of the learned Chief Judge's order is dismissed with costs, two gold mohurs.

The application for stay of proceedings in Civil Distress No. 4 of the said Court is also dismissed. The interim order for the stay of proceedings therein is hereby cancelled.

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## CRIMINAL REVISION.

*Before Mr. Justice Dunkley.*

1942

Jan. 9.

THE KING (MAUNG TIN MAUNG)

v.

KYAW MYINT AND OTHERS.\*

*Jurisdiction of District Magistrates and Sessions Judges in criminal revision—Code of Criminal Procedure, ss. 435 to 438 and 545—May order further inquiry or may report to High Court for orders—Cannot confirm any sentence or pass a judgment.*

*Held:* The powers of District Magistrates and Sessions Judges in revision are contained in sections 435 to 438 of the Code of Criminal Procedure, which sections are exhaustive; and they have no other powers.

An order under section 545 of the Code of Criminal Procedure can be made only "when passing a judgment". A District Magistrate or a Sessions Judge cannot pass a judgment in a revision proceeding.

DUNKLEY, J.—The District Magistrate of Magwe, acting under the provisions of section 435 of the Code of Criminal Procedure, called for the record of the proceedings in Criminal Summary Trial No. 60 of 1941 of the 2nd Additional Magistrate of Chauk. Having perused these proceedings, he made the remark that the case was one in which compensation out of the fine imposed ought to have been awarded to the complainant under the provisions of section 545 of the Code of Criminal Procedure. He then proceeded to pass the following order:

"Under the provisions of section 545 (1) of the Criminal Procedure Code read with section 545 (b) Criminal Procedure Code I direct that out of the fine if paid a sum of Rs. 25 (twenty-five) be paid to the complainant."

The District Magistrate had no jurisdiction to make such an order. The powers of District Magistrates and Sessions Judges in revision are contained

\* Criminal Revision No. 550 of 1941 against the order of the 2nd Additional Magistrate (1) of Chauk, dated the 29th day of May, 1941, passed in Criminal Summary Trial No. 60 of 1941.



in sections 435 to 438 of the Code, which sections are exhaustive. In the case of an accused person who has been discharged, further inquiry or commitment to Sessions may be ordered, and further inquiry may also be ordered into a complaint which has been dismissed. Also the result of the examination of the record of any proceeding may be reported to the High Court for orders. When a record is called for, execution of any sentence may be suspended and an accused person may be released on bail or on his own recognizances. The above are all the powers which a District Magistrate or Sessions Judge may exercise in revision, and he has no other powers. Section 545, no doubt, says that a criminal Court may make an order for compensation when the Court "confirms in appeal, revision or otherwise a sentence of fine", but a District Magistrate or Sessions Judge has no jurisdiction in revision to confirm any sentence.

Moreover, the section says that the order must be made "when passing judgment", and when a reference is made to the provisions of section 367 of the Code it becomes abundantly plain that a District Magistrate or Sessions Judge cannot pass a judgment in a revision proceeding. The order of the District Magistrate was therefore made without jurisdiction, and must be set aside.

However, I propose to treat the order of the District Magistrate as a report made to the High Court under the provisions of section 438 of the Code of Criminal Procedure. I have read the record of the proceedings of the 2nd Additional Magistrate of Chauk. It is clear that the accused committed the offence of mischief, under section 426 of the Penal Code, in that they destroyed property belonging to the complainant in the complainant's billiard

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saloon. This was therefore a case in which compensation ought to have been awarded to the complainant under section 545 (1) (b) of the Code of Criminal Procedure. I confirm the convictions and sentences of the accused, and I direct that out of the fines imposed a sum of Rs. 25 (twenty-five only) shall be paid to the complainant, Maung Tin Maung, as compensation under the provisions of the above section.

## APPELLATE CIVIL.

Before Mr. Justice Mya Bu and Mr. Justice Dunkley.

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v.

MAUNG TUN KHA.\*

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Jan. 5.

*Burmese Buddhist Law—Divorce and partition of properties—Cruelty—Nature of distinction between ill-treatment and cruelty—Cruelty under what circumstances ground for partition in divorce by mutual consent and for forfeiture of joint property on divorce.*

*Held:* There is a distinction between mere ill-treatment or personal violence and cruelty. In order to constitute cruelty ill-treatment in the shape of physical violence or infliction of mental pain must be done with indifference or delight in pain caused to the sufferer.

*Maung Kywe v. Ma Thein Tin*, I.L.R. 7 Ran. 790; Section 303 of Kinwun Mingyi's Digest, referred to.

The phrase "guilty or cruelty only once" fits in better with texts of *Dhammathats* more precisely than expressions "a single act of cruelty" or "a single act of misconduct".

When a spouse is "guilty of cruelty once" the other party is entitled to divorce.

*Ma Ein v. Te Naung*, 5 L.B.R. 87, overruled.

*Po Han v. Ma Talok*, 7 L.B.R. 79 and *Ma Sat v. Maung Nyi*, 4 U.B.R. 68, followed.

In such case partition of properties of marriage will be as in case of divorce by mutual consent, i.e. half share in the jointly acquired properties and one-third share in other spouse's *payin* or inherited *lettetpwa*.

*Ma Gyan v. Maung Su Wa*, (1899—01) 2 U.B.R. 28, followed.

But where cruelty is aggravated by the fact that instead of being repentent, the guilty party is desirous of divorce or by the fact that it is committed with intent to make the other party seek a divorce, or by other facts such as frequent repetition of acts of cruelty or grievous

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Civil First Appeal No. 60 of 1941 against the decree of the District Court of Yamethin at Pyinmana in Civil Regular No. 1 of 1939, dated the 4th March 1941.



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hurt within the meaning of s. 320 of Penal Code, the party guilty of such cruelty will be deprived of his or her share of the joint property on divorce.

*Hay* for the appellant.

*Tun Aung* for the respondent.

MYA BU, J.—The District Court having at a previous stage of the litigation between the parties granted the appellant a decree for divorce against the respondent but having ultimately decreed that the appellant is entitled to two-thirds and the respondent to one-third of the joint property, consisting of her *payin* property to the marriage, the appellant appeals against the latter decree on the ground that the grounds upon which she was entitled to the decree for divorce were such as to deprive the respondent of all interest in the joint property upon a divorce between them under the Burmese Buddhist law by which they are governed. Her claim for a decree for divorce was based upon repeated acts of cruelty committed by the respondent against her which were enumerated substantially in her plaint in the suit and in greater detail in her evidence at the trial. Her allegations regarding ill-treatment consisting of abusive words and physical violence to which the respondent subjected her, causing her physical pain and mental agony on no less than four distinct occasions, have been strongly corroborated by evidence of witnesses who were present on those occasions, and in the circumstances obtaining in the case her allegations regarding not only the ill-treatment to which she was subjected by the respondent on those occasions but also on other occasions at which witnesses were not present have rightly been accepted by the learned trial Judge as being substantially true. In the course of his

judgment upon which the decree for divorce was based the learned Judge observed :

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"From the above, I am satisfied that the defendant Tun Kha assaulted and ill-used Daw Pu Gyi on several occasions so that she is unable to live with him. There is sufficient evidence to show that her allegations are substantially correct."

There is no reason to doubt the correctness of this finding of fact and it has not been assailed on behalf of the respondent who did not appeal against the decree for divorce and to whom it is not open now to challenge it.

The fact that the appellant was a widow of 55 owning a substantial estate while the respondent was a bachelor of 25 with no property lends probability to the appellant's allegation that on certain occasions he openly declared or insulted her by saying that he had married her for her money and not for love. Since they were married in the presence of certain elders in June 1938 they lived together at the appellant's house at Pyinmana, and the woeful tale of misery told by the appellant commenced after the lapse of only a couple of months after the marriage. She said he used to abuse and assault her and demanded money from her for liquor. According to her such acts were repeated frequently. About four months after the marriage the respondent struck the appellant on the temple causing her to fall on the floor in the presence of witness Ma Khin Shwe on account of his unsatisfied demand for money. He added insult to the injury by telling her that he had married her not on account of love for herself but on account of love for her money. About 20 days after that the respondent, who was out the whole afternoon and came home about



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10 or 11 p.m., struck the appellant on the face with his fist and kicked her several times while witness Maung Po U was present in the house as a guest. The only apparent reason for this behaviour was that the appellant had retired to bed before he returned home. About 15 days later the appellant had to go to Aunggon village by train to collect rents from her paddy lands. As she could not catch the day train to return to Pyinmana she came back by the evening train which brought her in by about 8 p.m. in the company of Ma Khin Shwe and one Maung Kin Baing. The respondent on meeting the appellant at the railway station demanded an explanation for her failure to come back by the day train, and when she explained that she was too late to catch that train he not only abused her and threatened to do harm to her on reaching home but also snatched the basket which was in the appellant's hand and threw it away and also attempted to strike her with a stick. The appellant was so frightened and shocked by this conduct that she took refuge at the house of a niece instead of going back to her house. After that she did not go back to live in the house with the respondent. But a few days later, on the 28th January 1939, she went to her house to effect the sale of some of the paddy which was stored in the granary. She was accompanied by Maung Kin Baing, the purchaser Ko Maung Maung and some cart-men. As she was about to unlock the door of the granary the respondent, shouting out to her not to sell the paddy, shut the gate of the compound to cut off her retreat and rushing to the appellant caught hold of her hand and assaulted her by striking her on the face with his fist and kicking her and pounding her with his elbow so much so that the appellant



dropped her *longyi*. Not contented with this savage behaviour, he dragged the appellant along the ground. As a result of these acts of physical violence the appellant received some contusions and abrasions over her legs.

Such were the acts of ill-treatment suffered by the appellant at the hands of the respondent which the learned District Judge has held to amount to cruelty in the legal sense, upon which finding the learned District Judge has based the decree for divorce.

The question that falls for determination in this case is whether, considering the nature of the cruelty which has been made the basis of the decree for divorce in this case, the guilty husband should in law be deprived of all his interest in the joint property. Relevant texts are collected in section 303 of the Digest, Volume II, in which extracts from eleven *Dhammathats* including the *Manugye* are set out. The extract from the Rescript does not explicitly refer to divorce on the ground of cruelty and may be considered to have laid down a broad general principle with regard to divorce through the fault of either one or the other of the parties to the marriage.

Of the examined *Dhammathats* mentioned in section 303, the *Manugye* and the *Manu* are prominent in stating the law to the effect that where a husband is guilty of cruelty the wife is entitled to a divorce, but if the husband gives an undertaking not to repeat the offence the wife should agree to continue to remain in union, and if, however, she declines to do so she is entitled to a divorce as a divorce by mutual consent, and further that if the husband, after having given the undertaking accepted and acted upon by the wife by

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continuing to remain in union, is again guilty of cruelty, then the wife will be entitled to a divorce of the kind on which the husband forfeits or is deprived of all his interest in the joint property. The *Manugye* and the *Manu* require the taking of a lesser wife in addition to ill-treatment for granting the wife the rights granted to her by the other *Dhammathats* on the ground of cruelty. In *Maung Kywe v. Ma Thein Tin* (1) my late learned brother Baguley J. very pertinently pointed out that there was a distinction between the word "cruelty" and the term "physical violence" and gave what I respectfully consider as a true guide as to the meaning of cruelty in the legal sense in these words:

"It is unfortunate that in many of these cases the word 'cruelty' has been used as though it were interchangeable with the term 'physical violence'. The two in my opinion appear to be quite distinct. The essence of cruelty does not consist in violence. 'Cruel' is defined in Chambers' Dictionary as 'Disposed to inflict pain, or pleased at suffering; void of pity, merciless, savage; severe', and in the Concise Oxford Dictionary the word 'Cruel' is defined as 'Indifferent to, delighting in, another's pain'. Therefore, cruelty really depends on the state of mind of the person inflicting pain rather than the actual infliction of the pain. Naturally, a series of assaults which result in the sale of so much of the granary different to the pain that was being inflicted; but if a single act is regarded as a single act of cruelty, the assault must in itself be such as to warrant the assumption that the person committing it was indifferent to, or pleased with, the pain he was inflicting."

In the light of these observations it is hardly necessary to point out that ill-treatment does not necessarily constitute cruelty. Ill-treatment in the

shape of physical violence, or of infliction of mental pain must have been done with indifference to or delight in the pain caused to the sufferer. It is quite possible that the compilers of the *Manugye* and the *Manu* advisedly and deliberately employed the term "ill-treatment" or "ill-treat" to denote something which fell short of what was meant by the word "cruelty" used in the other *Dhammathats*. This consideration and the fact that under the Burmese Buddhist Law the first wife ordinarily has an indisputable right to a divorce as by mutual consent against her husband if the latter has taken a second wife without her consent [*In re Maung Hme v. Ma Sein* (1)], without the necessity of proving any other fault on the part of her husband, lead me to the conclusion that the rule enunciated in the *Manugye* and the *Manu* and reproduced in section 303 of the Digest, Volume II, is not of direct applicability to cases where cruelty in the legal sense constitutes the ground for divorce. Therefore, in my opinion, the rule stated in the *Manugye* and the *Manu* does not possess sufficient weight to militate against that stated in the eight other *Dhammathats*.

The general effect of the several texts on the subject examined by the learned Judicial Commissioner of Upper Burma is stated in *Ma Gyan v. Maung Su Wa* (2) to be that

"where a husband is guilty of misconduct a *locus penitentiae* should be given before he is to be treated as a matrimonial offender. \* \* \* But on the other hand \* \* \* the wife is not bound to give her husband another chance; she can insist on her claim to divorce at once. If she takes the latter course, she has a right to a half share of the

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(1) 9 L.B.R. 191.

(2) (1899—1901) 2 U.B.R. 28.



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property, while if she prefers the former and her husband offends again, she gets the whole of it."

This was stated to be the rule even though the misconduct of the husband may be of a mild type.

[NOTE: The phrase "a right to a half share of the property" was used to denote the division of property as in a divorce by mutual consent where the husband and wife each takes half of their jointly acquired property and only one-third of the other spouse's *payin* or inherited *lettetpwa*.]

Substituting the word "cruelty" for the word "misconduct" for greater precision, this statement is practically on all fours with the general effect of the eight *Dhammathats* set out in section 303 of the Digest, Volume II.

With all respect, the statement "Section 303 moreover enjoins that a divorce should not be granted to a woman for a single act of cruelty from her husband but only if repeated after he has given promise of amendment" appearing in the judgment in the case of *Ma Ein v. Te Naung* (1), is, in my opinion, not an accurate rendering of the effect of the texts on the subject: and this inaccuracy was pointed out by Twomey J. in *Po Han v. Ma Talok* (2), where the learned Judge observed (at page 80):

"Moreover, it is clear from the texts cited in section 303 of the Kinwun Mingyi's Digest (Vol. II—Marriage) that even where the husband has been guilty of cruelty only once, it is open to the wife to insist on a divorce and she is entitled to get it, subject to a penalty, the penalty being that the divorce shall be effected as if both parties desired it \* \*."

The learned Judge adopted the interpretation put upon the texts by the learned Judicial Commissioner in *Ma Gyan v. Maung Su Wa* (3). The same

(1) 5 L.B.R. 87.

(2) 7 L.B.R. 79.

(3) (1899—1901) 2 U.B.R. 28..

interpretation was adopted also in *Ma Sat v. Maung Nyi Bu* (1), where it was observed (at page 69):

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'It was held as long ago as 1897 in the case of *Ma Gyan v. Maung Su Wa* (2), that if a husband is guilty of a single act of misconduct, the wife is not bound to give her husband another chance; she can insist on her claim to divorce at once. If she takes the latter course, she has a right to a half share of the property.'

With all due respect I observe that the phrase "guilty of cruelty only once" used in *Po Han v. Ma Talok* (3) fits in with the language of the texts much more precisely than the expressions "a single act of cruelty" and "a single act of misconduct" employed in *Ma Ein v. Te Naung* (4) and *Ma Sat v. Maung Nyi Bu* (1). Thus, the weight of judicial and textual authority is distinctly in favour of the proposition that where the husband is guilty of cruelty to his wife once, the latter has an unqualified right to a divorce as by mutual consent.

There has, however, been no reported case in which a wife was granted a decree for a divorce of the kind on which the husband forfeits or is deprived of his interests in the joint property. Under the *Dhammathats*, however, the wife will have an indisputable right to such a divorce if the husband, having been guilty of cruelty and having given an undertaking not to repeat the offence, is again guilty of cruelty. While six out of the eight *Dhammathats* which lay down this rule are silent as to what is to be done in case the husband refuses or declines to give the undertaking, the

(1) (1921-22) 4 U.B.R. 68.

(2) (1899—(1901) 2 U.B.R. 28.

(3) 7 L.B.R. 79.

(4) 5 L.B.R. 87.

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other two, namely the *Vinicchaya* and the *Pakasani* give the following rules :

*Vinicchaya* :

"If, on the other hand, the husband also desires the divorce, let him relinquish all claims to the property belonging to them, liquidate all debts, and free her from the marriage bond."

*Pakasani* :

"If, notwithstanding that the charge of cruelty is proved against him, the husband sues for divorce, let it be granted, but let him make over the whole of their property to the wife and liquidate all the debts."

What may reasonably be deduced from these rules appears to be that, cruelty being a matrimonial offence, if the husband who has been guilty of cruelty is, instead of repenting of his offence, desirous of a divorce, or in other words adds to his guilt an expression of his desire for a divorce, the wife is entitled to a divorce of the kind on which the husband forfeits or is deprived of his share in the joint property. If the wife enjoys such a right, it appears to be but a necessary corollary that she should enjoy a similar right against her husband who has treated her cruelly with intent to make her seek a divorce against him. Whether the desire for a divorce be the motive for the commission of the offence or it be expressed after the commission of the offence the desire for a divorce cannot but be regarded as a highly aggravating factor in a matrimonial offence. It is impossible to conceive of any reason whatever as to why the Burmese Jurists of the olden days or the Burmese public opinion of the present day should have recognized just one rule for ill-treatment amounting to cruelty in the legal sense and also for ill-treatment amounting to legal cruelty of an



aggravated nature. Upon these considerations I have come to the conclusion that where the offence of cruelty has been aggravated by the fact that it was committed with intent to make the wife seek a divorce or by the husband's expression of a desire for a divorce instead of repentance for the wrong, the wife is entitled to a divorce of the kind on which the husband forfeits or is deprived of his share in the joint property. It is easy to conceive of many other kinds of aggravating circumstances, such as frequent repetitions of acts of cruelty, infliction of grievous harm (similar in the case of bodily injury to grievous hurt within the meaning of section 320 of the Penal Code) for which the husband should be liable to be divorced and be deprived of his share in the joint property at the instance of the aggrieved wife.

The learned District Judge came to the conclusion that such a divorce could only be granted against the husband who, after admitting a series of previous assaults on his wife and giving an undertaking before the elders not to commit such a misconduct on pain of losing his right to the joint property, misbehaved again. The value of this statement is materially minimized by the use of the phrase "a series of previous assaults", for, as pointed out by Baguley J. in *Maung Kywe's* case (1), there is an appreciable distinction between the meaning of the word "cruelty" and that of the term "physical violence" in which "assaults" must be included. Inasmuch as the condition imposed by the learned District Judge is something more than the granting to the husband of a *locus pœnitentiæ* spoken of in *Ma Gyan v. Maung Su Wa* (2), I consider that it is inconsistent with the

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(1) [ ] I.L.R. 7 Ran. 790.

(2) (1899—1901) 2 U.B.R. 28.

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law laid down in the *Dhammathats* as judicially interpreted in the light of modern conditions. It is easy to conceive of many other ways of giving the *locus pœnitentiæ*, opportunity to repent, than going before the elders and accepting the apology. Where the circumstances of the case show that the aggrieved wife did not hastily sue for a divorce as soon as the husband was guilty of cruelty but continued to live with him in the hope of his improving his conduct and the husband instead of showing improvement repeated the offence in such a way as to show his determination not to be penitent for his wrong, it will be just and fair to presume that the husband was given the opportunity to repent and yet instead of repenting aggravated his offence by repetition of his offence. Whether such a presumption may properly be drawn or not must depend on the circumstances of each case. It is not the repetition *per se* which, in my opinion, will justify the raising of the presumption. Where the intervals between the offences are long during which a husband—so to speak—turns over a new leaf and treats his wife with the ordinary kindness and consideration of a husband to his wife, it will be only fair to regard him as having been penitent for his past offence or offences and, in such a case, it will not be right to regard the repetition as an aggravating circumstance. Frequency of repetitions is an important factor as militating against the idea of the husband having repented for his past offence or offences.

Applying these principles to the facts of the present case, the appellant is, in my judgment, entitled to a divorce from the respondent, a divorce of the kind on which the husband forfeits or is

deprived of his share in the joint property. The proved facts of the case show not only that the respondent was guilty of cruelty to the appellant, but that he was guilty of cruelty of the aggravated form. I may even say that the cruelty of which the respondent was guilty is of a doubly aggravated form inasmuch as it was aggravated by the obvious motive, for the commission of the offence and by the fact that the acts of cruelty were frequently repeated. His setting out on his career of ill-treatment barely two months after the marriage and his open declarations of his having married her for her money and not for love constituted good proof of the motive. In addition to the four occasions on which the respondent ill-treated the appellant in the presence of witnesses, there were other occasions of abuses, insults and assaults amounting to acts of cruelty in the legal sense committed by the respondent against the appellant, all within a short space of six months out of a short-lived union of eight months which clearly show that the respondent, instead of being penitent, was determined to make the appellant's life in union with him quite intolerable and to make her seek a severance of the union. It will be putting a premium on cruelty if a husband with impunity can fulfil his desire of divorcing his wife by behaving in the way that the respondent has done towards the appellant. In the present case, it is not only with impunity that the appellant will have achieved his object but with definite gain of one-third of the appellant's wealth if there be one uniform law for cruelty and for cruelty of an aggravated form. In my opinion, the facts and circumstances of the case render the respondent justly liable to be penalized in the way contemplated by Law.

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I, therefore, allow this appeal and, while confirming the decree of the trial Court for a divorce in favour of the appellant and against the respondent, I direct that the decree of the trial Court declaring the shares of the parties in the properties set out in items Nos. 1 to 7 of the schedule attached to the plaint be altered into a decree declaring that the appellant is absolutely entitled to such properties. The respondent must pay the appellant's costs in both Courts, advocate's fee in this appeal 15 gold mohurs.

DUNKLEY, J.—I agree.

## LETTERS PATENT APPEAL.

Before Sir Ernest Goodman Roberts, Chief Justice, and  
Mr. Justice Dunkley.

U KYA BYU AND ANOTHER

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Dec. 9.

*Gift of property—Gift in præsenti—Terms of document of gift and circumstances clear—Oral evidence to show death-bed gift inadmissible—Requisites of death-bed gift among Burman Buddhists—Gift by a sick person—Evidence Act, s. 92.*

Where the contents of a document clearly show that there was an outright gift *in præsenti* and the circumstances show that the donor was willing to dispose of all his property in terms which were unambiguous oral evidence to show that it was intended to be a death-bed gift or a testamentary disposition is inadmissible as between the parties to the deed.

*Balkishen Dass v. Legge*, I.L.R. 22 All. 149 (P.C.); *Maung Kyin v. Ma Shwe La*, I.L.R. 45 Cal. 320 (P.C.), referred to.

In order to prove a death-bed gift under Burmese Buddhist law it must be shown first that the donor was in fact on his death bed and secondly that he had no hope of recovery at the time of making the gift. In the absence of such circumstances, there is no rule of law whereby a sick man is prevented from the disposition of every item of his property provided such disposition is to take effect at once.

*U Tezawuntha v. Maung Zaw Pe*, I.L.R. 10 Ran. 224, referred to.

*Doctor* for the appellants.

*Ba Sein* for the respondent.

ROBERTS, C.J.—This is a letters patent appeal arising out of a case in which the plaintiff-appellants who are Burmese Buddhists and are husband and wife brought a suit against their adopted son the present respondent for the recovery of possession of two pieces of paddy land situated in the township of Pyapôn.

\* Letters Patent Appeal No. 2 of 1941 from the judgments of this Court in Special Civil 2nd Appeal Nos. 275/295 of 1940 from the judgment of the District Court of Pyapôn in Civil Appeal No. 2 of 1940.

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It appears that on 18th November 1932 the appellants conveyed these lands by deed to the respondent in the following terms :

" On the 6th Waning of *Tazaungmon* 1294 B.E. (18-11-32) at Pyapôn Town the above-named persons making a gift by way of partition say and make a gift by way of partition to the abovementioned recipient in the presence of *Lugya's* (Elders) as follows :

In view of the Law of impermanency on account of the present disease with which I, U Kya Byu, the father, am afflicted, and with the object of attaining merits of the present and the future existence, I as well as my wife Daw Shwe Su (both the parents) make a gift by way of partition of inheritance even from now by consent to our jointly adopted son Maung Aung Thein. As the properties, which are divided and given, are free from all incumbrances, such as mortgage, debt, etc., we do hereby now sign hereunder and divide and give outright as 'Thinthi' out of goodwill in the presence of witnesses the said properties which are mentioned in the list below in order that the recipient Maung Aung Thein may be the sole owner of the same, and that he (Maung Aung Thein) may, of his own accord, mortgage, sell, transfer, give away in charity, use, and receive any benefits thereof."

The Subdivisional Judge held that a reference to this deed clearly showed that it was in reality a death-bed gift, and that its contents revealed no other intention but that the transfer was to take effect only after the death of the first plaintiff. With this view the learned District Judge agreed.

Now the true nature of what is known as a death-bed gift has been carefully explained by a Bench of this Court in *U Tezawuntha v. Maung Zaw Pe* (1). Mya Bu J. said (at p. 228) :

" It is clearly deducible from the Burmese phrases quoted above that what is known as a death-bed gift under the

(1) [ ] I.L.R. 10 Ran. 224.



Burmese Buddhist Law is a gift made while the donor is in fact on his death bed and about to die, or in other words when his death is imminent.

In my opinion the gift must also be made by the donor in the hopeless expectation of death."

There are thus two requisites which must be shown to exist before a death-bed gift can be proved, first, that the donor was in fact on his death bed and, secondly, that he had no hope of recovery at the time of making the gift. The present suit was brought nearly seven years after the deed was executed and it is therefore plain that the donor was not in fact on his death bed although he may have feared at the time that he was.

On second appeal the learned Judge of the High Court held that the appellants were not entitled to prove the intention of the parties to the deed by oral evidence and quoted at length from the judgment of their Lordships of the Privy Council in *Maung Kyin v. Ma Shwe La* (1). In my respectful opinion he was right in so holding, and was indeed bound to hold as he did.

However, the appellants seek to say that by reason of the 1st proviso to section 92 of the Evidence Act they are entitled to prove facts which would invalidate the document by reason of its illegality: and that although it is not a death-bed gift still it is a testamentary disposition. They seek to show that at a time at which the donor was suffering from a serious illness he disposed of all his property and contend that from this evidence the inference should be drawn that the transfer was illegal since it was testamentary in character.

The answer to this seems to be that which has been given by the learned Judge in second appeal.

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(1) ( - ) I.L.R. 45 Cal. 320, 331, 332 (P.C.).

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He has pointed to the fact that the deed itself is expressed to operate

"by way of partition of inheritance even from now"

and that it is expressly stated that

"we do hereby now sign hereunder and divide and give outright . . . in order that the recipient may be the sole owner and may of his own accord mortgage sell transfer give away in charity, use, and receive any benefits thereof."

It is thus impossible to agree that it reveals the intention that it is to take effect only after the death of the first plaintiff.

In my judgment it would be impossible to hold that such a transfer was testamentary in character. The male plaintiff should not have been permitted in evidence to say "I divided the inheritance with the intention that the partition was to take effect only after my death" for such a statement was inadmissible. It appears that in 1934 the respondent applied for the removal of attachment of the suit lands by a chettyar in execution of a decree, and the male plaintiff gave evidence on his behalf: at that time there was no suggestion that the suit lands were not the property of the respondent.

It is of course perfectly true that although evidence of the intention of the parties cannot be given as between them or their representatives in interest to contradict or vary the terms of such an instrument as is referred to in section 92 or to add to or subtract from them, yet it is permissible to prove any fact which would invalidate the instrument. We have inquired what evidence was excluded the admission of which might invalidate the instrument. The Court knew that the male donor was ill when the instrument was executed, for the recitals were



admitted to be true. There is no rule of law whereby a sick man is prevented from the disposition of every item of his property provided such disposition is to take effect at once, and is not shown to have been in fact on his death bed and with no hope of recovery. The fact therefore that he disposed of all his property is irrelevant. No other fact has been urged before us in support of the contention that the transfer was invalid as being testamentary in character, except that it is sought to give evidence that the donor's intention was to make it so.

As was observed by Lord Davey in *Balkishen Dass v. Legge* (1) the case must be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to "existing facts". The contents of the document here shows that there was an outright gift, and the circumstances show that the donor was willing to dispose of all his property in terms which were unambiguous. He is said to have stated that he wished to do this to avoid complications after his death. The respondent was found to be the *kittima* adopted son of the plaintiff-appellants: a contest as to this matter might well be feared, and might move them to give away some of their property to him. It was not until seven years afterwards that they have challenged the validity of the instrument: it transpires that the respondent left their house on his marriage and is no longer on good terms with them. Accordingly this appeal must be dismissed with costs, advocate's fee ten gold mohurs.

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(1) ( ) I.L.R. 22 All. 149, 159 (P.C.).



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DUNKLEY, J.—I agree. Evidence of the intention of the parties to the document was clearly inadmissible; the authorities cited by the learned Judge on second appeal are conclusive on that point. Apart from evidence of intention, no doubt, evidence of facts and circumstances tending to show that the document is not what it purports to be, namely, a gift *in presenti*, but is a testamentary disposition of property was admissible under the first proviso to section 92 of the Evidence Act for the purpose of proving that the transfer was void by reason of the personal law of the parties; but evidence of this character was so meagre that it could not affect the decision. Reference is made to the fact that four similar deeds were executed at the same time, whereby the appellants purported to give away the whole of their property to their children. No inference in favour of the testamentary character of the instruments can arise from this fact, seeing that U Kya Bu himself has stated that the appellants divided their property among their children during their lifetime so that the adopted son (the respondent) should not be deprived of his proper share by the natural children after their death. Secondly, it is urged that the appellants continued to enjoy the usufruct of all the property after the deeds had been executed; but this assertion is not in accordance with the plaint, which avers that the respondent has been in possession of the paddy lands in suit since 1937, and as the learned Judge on second appeal has pointed out, a gift of property is not invalidated by the donee agreeing to allow the donor to continue in the enjoyment of the income of the property. Thirdly, it is said that the natural children of the appellants have accepted the position that the deeds in their favour give them no

present right to the property; but how evidence regarding their attitude is relevant in the present case I cannot imagine. Lastly, it is said that these deeds were executed by reason of the serious illness of the first appellant, but, as my Lord has pointed out, the Burmese Buddhist law regarding death-bed gifts has no application in this case because the first appellant did not in fact die, and no inference contrary to the plain terms of the deeds themselves can arise from the mere fact of his illness. Hence the admissible evidence is so meagre and vague that it cannot support a conclusion that the document in question is not what it purports to be, namely, a gift *in presenti*.

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## APPELLATE CIVIL.

*Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice,  
and Mr. Justice Dunkley.*

1941  
Dec. 2.

HAJI GHULAM HUSSAIN SHERAZEE

v.

AGA MAHMOOD SHERAZEE.\*

*Probate—District Judge's power to demand administration bond—Verbal complaint by one executor against co-executor after grant—No power to order administration bond—Succession Act, s. 291 (2).*

The District Judge may demand a bond at the time of the grant of letters of administration or probate, but no power is given to him under the Succession Act to hold an enquiry at some later date on the verbal complaint of one executor against his co-executor and to order both the executors to furnish an administration bond.

*Giribala Dassi v. Halidar*, I.L.R. 31 Cal. 688, referred to

*Rauf* for the appellant.

*Venkatram* for the respondent.

ROBERTS, C.J.—I am of the opinion that the learned District Judge in this matter acted beyond the powers given to a District Judge by the Succession Act.

Upon a verbal complaint of the second executor Aga Mahmood Sherazee made to him on the 15th January, 1941, he issued notice to both the executors to show cause why they should not enter into an administration bond, and he held what he has described as an enquiry respecting the allegations made into the conduct of Haji Ghulam Hussain Sherazee by the other executor and in the result he ordered both the executors to file a bond.

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\* Civil 1st Appeals Nos. 64 and 85 of 1941 from the order of the District Court of Mandalay in Civil Misc. Case No. 53 of 1931.



Now there is authority in *Giribala Dassi v. Bijoy Krishna Haldar* (1), of a Bench, for saying that under the Probate and Administration Act then in force a District Judge is not competent to call upon the executor to whom probate has already been granted to furnish security at any time *after* the grant of the probate, and looking at the provisions of the present Succession Act and in particular at section 291 it would appear that at the time of the grant of Letters of Administration or Probate in the cases mentioned in sub-section (2) the District Judge may demand a bond, but no power is given to him to hold an enquiry at some later date upon *ex parte* representations made to him by any person, and in my opinion he exceeded his powers in so doing. It is true that in *Surendra Nath Pramanik v. Amrita Lal Pal Chaudhuri* (2) Mukerjee J., in the course of his judgment, referred to the above case without approval of it, but he pointed out that the matter then under consideration did not call for any consideration of the details of that case; and in the case which he had just reviewed it was clearly shown that applications had been made for the taking of a bond in circumstances which had materially changed through lapse of time, and in which legal proceedings had been taken in the ordinary course of events. Here they seem to me to have sprung as it were from nothing, and I must therefore hold that the learned District Judge was not justified in the course which he took. Neither executor supports the order which was made and we must set aside the order.

In view of the fact that each of the appellants is respondent in the other appeal there will be no order for costs.

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(1) ( ) I.L.R. 31 Cal. 688. (2) ( ) I.L.R. 47 Cal. 115.

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DUNKLEY, J.—I agree.

I desire to reserve for further consideration the question whether a District Judge can, after the grant of probate, call upon an executor to furnish security, although, so far as I know, the case referred to by my Lord, *Giribala Dassi v. Bijoy Krishna Haldar* (1), has not been dissented from by any High Court. The practice which was adopted by the learned District Judge in this matter was, in my opinion, wholly erroneous. He opened his enquiry because a verbal complaint was made by one executor against his co-executor, and there is no provision of the Succession Act under which any enquiry on such a verbal complaint could be made. If the allegations made by Aga Mahmood Sherazee against Haji Ghulam Hussain Sherazee had been justified they might have been used to support an application for revocation of probate, but no such application was made to the District Court, and the learned District Judge had no jurisdiction to hold any such enquiry as he did hold on a verbal complaint made to him personally. Moreover, when he found that there was no substance in the complaint, he was entirely wrong in penalizing both the executors by ordering them to furnish security: and it is noticeable that he has penalized the person, namely Aga Mahmood Sherazee, who made the motion before him, if there was any motion before him, and this is contrary to an ordinary principle of judicial procedure.

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(1) ( ) I.L.R., 31 Cal, 688.

## PRIVY COUNCIL.

MAUNG SIN

v.

MAUNG BYAUNG AND OTHERS.

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Apl. 3.

[On appeal from the High Court at Rangoon.]

*Suit for partition—No claim for administration of the estate—Competency of Court to ascertain and declare the shares of heirs—Duty of Court to do so.*

*Held :* Though the suit was framed for partition alone and though the suit is not for the administration of an estate nor was there a claim for administration or for the accounts and the subject matter may be only for a portion of the estate ; it is not only competent for the Court to ascertain and declare the shares of the heirs or the parties but also it is its plain duty to do so

Judgment of the High Court affirmed.

The judgment of their Lordships was delivered by

LORD ROMER : This is an appeal from a decree of the High Court of Judicature at Rangoon made in a suit that was begun as long ago as the 20th December, 1912. A complete history of the proceedings in the suit and the events that led up to it would occupy many hundreds of pages of printed matter. But the question to be decided on this appeal is a short one, and the facts material to its decision can be stated with comparative brevity. They are as follows :

One U Baw, a Burman Buddhist, died intestate on the 28th December, 1907, leaving surviving him a son (the appellant Ko Sin), two daughters, and the widow (the fourth respondent) and three children

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*Present :* LORD ATKIN, LORD THANKERTON, LORD ROMER, SIR GEORGE RANKIN and LORD JUSTICE CLAUSON.



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(the first, second, and third respondents) of a son, Ko Po Cho, who had pre-deceased him intestate by only 15 days. After some dispute letters of administration to the estate of U Baw were granted to his son Ko Sin on the 14th January, 1910.

At the time of U Baw's death there were properties both moveable and immovable standing in the joint names of U Baw, Ko Po Cho, and Ko Sin. There were others that stood in the joint names of Ko Po Cho and Ko Sin. But there appear to have been serious disputes between the members of U Baw's family as to the beneficial ownership of these various properties.

On the 20th February, 1910, with a view apparently of settling these disputes, an agreement was entered into referring them and some other matters to an arbitrator for decision. The parties to the agreement were Ko Sin, his two sisters, Ko Po Cho's widow, Ma Shwe Yu, and two persons purporting to act as guardians of the three children of Ko Po Cho, who at that time were minors.

Disputes arose at a later date as to the extent of the duties and powers of the arbitrator under this agreement and under a supplemental agreement of the 12th April, 1910, between the same parties. Their Lordships are not however concerned with these matters on this appeal and it is not therefore necessary to consider the precise terms of the agreements. It is sufficient for the present purpose to state that it was provided in effect by clause 5 of the principal agreement that out of the share in the two before-mentioned categories of property found to belong to Ma Shwe Yu and her three children, Ma Shwe Yu was to take one-third and the children were to take two-thirds.

On the 10th June, 1910, the arbitrator made his award. He did not deal with all the items of property included in the two categories; in particular he excluded from his award such of the items as consisted of mortgages. But he purported to ascertain the shares of the several parties in the remaining items, including the shares in such items of Ma Shwe Yu and her children. It is unnecessary to state in detail the effects of his findings about the several shares. All that need be said about them is that out of the properties in the two categories with which he dealt in his award he found that a very large proportion belonged to U Baw alone, and that the beneficial interest therein of Ko Po Cho was quite small in comparison.

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On the 9th December, 1910, Ko Sin applied to have the award filed in Court. This application was opposed on various grounds by Ma Shwe Yu and her three children, the principal ground of their opposition being that the whole award was invalid owing to the minority of the three children. In the end the application was dismissed by the District Judge by order dated the 4th October, 1912. He was not, he said, prepared to say that the award was invalid or that no suit could be filed to enforce it on the major parties thereto; but it certainly appeared to him that the award was not one which should be filed. No suit was in fact ever filed to enforce it.

Nor for the moment did Ma Shwe Yu take any steps to have the award declared invalid. She merely ignored it, and on the 20th December, 1912, she instituted the present suit with the object (amongst others) of obtaining by a decision of the

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Court a larger share of the properties contained in the two categories of properties mentioned above than had been given her by the award.

By her plaint she accordingly set out in schedule A thereto various properties moveable and immovable standing in the joint names of Ko Po Cho and Ko Sin, and in schedule B similar properties standing in the joint names of U Baw, Ko Po Cho, and Ko Sin. It should be mentioned that in the schedules are to be found not only properties that had been dealt with by the arbitrator in his award, but also properties that had not been so dealt with by him. The original defendants to the suit were her three children and Ko Sin, but U Baw's daughter Ma Nge Ma who had by this time acquired her sister's interest in the said properties was added as a defendant shortly after the institution of the suit.

Now the question to be determined upon this appeal is whether, as held by the High Court overruling the District Judge in this respect, the three children although defendants are entitled to have their interests in the properties, the subject matter of the suit, determined by the Court, or whether they are to be forced into bringing a separate suit for the purpose, a suit in which Ko Sin states that he would rely on the Limitation Act as affording him a complete defence. This attitude of his is dictated by the fact that, as will presently appear, the award has been decided to be a nullity so far as the children are concerned. In these circumstances it is necessary to examine carefully the plaint and the subsequent proceedings in the suit. Ma Shwè Yu alleged in her plaint that all the properties set forth in the two schedules had been acquired by moneys



advanced by Ko Po Cho during her coverture, as to the properties in schedule A, jointly with Ko Sin, and, as to the properties in schedule B, jointly with Ko Sin and U Baw. She then claimed that under Burmese Buddhist Law all the assets and estate acquired during her coverture with Ko Po Cho were the joint acquired property of herself and Ko Po Cho and that she was entitled to an undivided half share therein in her own right and to a life estate in the remainder until partition. The plaintiff consequently—so she alleged—joined her three children as *pro forma* parties and “for the better representation of the estate of Ko Cho”. But the children were by no means merely formal defendants. She was claiming an interest in the subject matter of the suit adversely to them, and, as it turned out, quite wrongly. For she had re-married on the 27th January, 1910, and had thereby forfeited all interest in Ko Po Cho's share in the joint property of the two—an interest which as a matter of fact would seem but for her re-marriage to have been a larger one than the one she claimed. But apart altogether from this the children were necessary parties to the suit as is made clear in the next allegation in the plaint. For in that allegation she claimed that the joint estate of herself and Ko Cho or in the alternative the estate of Ko Cho was entitled to a half and third shares respectively in the properties specified in schedules A and B; and the children were certainly interested in the question whether it was the joint estate of the widow and Ko Po Cho or the estate of Ko Po Cho alone that was entitled to share in the scheduled properties. The plaintiff prayed for declarations in accordance with these several allegations, and a partition of the properties. There is no mention of the award in the plaint from beginning to end.

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In due course written statements were filed on behalf of two of the children disputing their mother's claim to be interested in more than one-half of the joint estate of herself and Ko Po Cho. Written statements were also filed by Ko Sin and Ma Nge Ma pleading the award as a defence to the action. The plaintiff thereupon filed a reply alleging that the award was invalid. It was subsequently held, however, by the District Judge, on an issue framed with a view of having the point decided, that the award must be treated as valid unless and until the plaintiff filed a suit to set it aside and succeeded in so doing. The plaintiff appealed from this decision but her appeal was dismissed. In the meantime one of her sons had instituted a suit against Ko Sin and Ma Nge Ma for the purpose of setting aside the award, and subsequently Ma Shwe Yu and her other two children, who had in the first place been added as defendants, were struck out as defendants and added as plaintiffs. It is unnecessary to trace the history of this suit which ultimately came up for decision by this Board. It is sufficient to say that in the end it was decided that the award was not binding upon any of the three children as they were minors at the date of the reference. But the question whether it ought on that account to be treated as a nullity as regards the other parties to the reference was expressly left open by the Board. This was on the 5th May, 1925.

In the meantime the suit the subject matter of the present appeal had not been entirely at a standstill in the District Court. Issues had been framed including one as follows :

“ What is the extent of Ma Shwe Yu's interest in the property inherited from Ko Cho as against

he children of Ko Cho in regard (A) sole property of Ko Cho (B) jointly acquired property of Ko Cho and herself?" Their Lordships fail to understand why this issue should have been framed if, as is now contended by the appellant, the shares of the children cannot be determined in the suit. The whole object of the issue must have been to enable the Court to effect a partition between the widow and her children of the properties referred to.

No judicial determination of the issue, however, became requisite inasmuch as on the 1st August, 1918, Ma Shwe Yu and her three children, all of whom had by that time reached majority, arrived at an agreement that the estate of Ko Po Cho should be divided between them in equal fourth shares.

On the 15th August, 1918, a preliminary decree was passed ordering (amongst other things) that enquiries be made (a) as to the property belonging to the estate of Ko Po Cho (b) as to the liabilities of that estate. It seems reasonably clear that these enquiries were not intended to apply to the whole estate of Ko Po Cho but only to the interest of his estate in the properties included in schedules A and B to the plaint. There is nothing, however, to indicate that the enquiries were to be limited to ascertaining the share of Ma Shwe Yu in that part of his estate or the liabilities attaching to that share. It was the whole of that part of his estate that was the subject matter of the enquiries. Directions were subsequently given to the Commissioner entrusted with the enquiries that he was to distinguish between the properties that had and those that had not been adjudicated upon by the award and that as regards the latter the Commissioner was to come to his own findings in respect of them.

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The Commissioner having made the enquiries pursuant to the preliminary decree and to the subsequent directions, which enquiries took about eight years to complete, submitted his report to the District Court in 1929. Various objections to the report were filed by the parties, and the matter eventually came before the District Court for the purpose of having a final decree pronounced. On the 7th May, 1931, the District Judge pronounced judgment. For reasons that need not be set out here he thought it advisable not to come to any conclusion upon the question whether the award was binding upon Ma Shwe Yu: he left that to the Appellate Court. But he held that the shares of the three children of Ko Po Cho were not to be determined in the present suit. It was he said a partition suit pure and simple and not a suit for administration. Accordingly, after an exhaustive examination of the Commissioner's report, the parties' objections to it, and a mass of evidence, he contented himself with finding the share in the estate of Ko Po Cho to which Ma Shwe Yu was entitled. He first found what she was entitled to in the items of property numbered 1 to 19 in the schedules to the plaint, which items were the only ones included in the award. As to these items, the Commissioner's report had apparently merely followed the award under which Ma Shwe Yu had got, (a) one-eighteenth share in items Nos. 1 to 5, (b) one-twelfth share in items Nos. 6 to 17, and (c) one-ninth share in items Nos. 18 and 19. Now these shares represented the one-third share to which Ma Shwe Yu was entitled by reason of clause 5 of the agreement of reference of the 20th February, 1910, in the interest in these various items found to belong to the estate of

Ko Po Cho; so that the shares to which his estate was entitled in the items under the above headings were (a) one-sixth, (b) one-fourth and (c) one-third respectively. But before the learned District Judge Ko Sin and Ma Nge Ma through their advocates had stated that they were willing that there should be given to Ma Shwe Yu not only her own interest in these items but also the two-thirds interest therein to which her three children would have been entitled if the award had been binding upon them. And this the learned Judge strangely enough proceeded to do. Having held that the children could not have their proper shares in Ko Po Cho's estate ascertained in the present suit (and they would of course have had to be ascertained upon the footing that they were not bound by the award) he nevertheless treats them as though they had been so bound; decreed that their mother was entitled to the shares in the 19 items which they had been awarded; ordered that the properties should be partitioned on that footing; and that the mother should be given possession of the share so decreed to her. The learned Judge apparently also dealt with the properties that were not covered by the award in the same way, decreeing the whole share of Ko Po Cho in these properties to Ma Shwe Yu, differentiating in no way between her and her children. This was of no great moment to the children as they were willing to trust their mother to carry out the agreement that they had made with her in August, 1918. But it was a very different matter as regards the properties dealt with by the award, inasmuch as if the decree of the District Judge were allowed to stand they would be for ever debarred from establishing their right to a larger share in such

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properties than the arbitrator had given them. Ma Shwe Yu was also desirous of disputing the validity of the award as regards herself." Accordingly she and her three children jointly presented an appeal to the High Court at Rangoon from the decree of the District Judge.

The High Court gave judgment on the 22nd March, 1937. They dismissed the Appeal so far as Ma Shwe Yu was concerned. They held that the award was binding upon her. From this decision no appeal has been brought by Ma Shwe Yu, and their Lordships are not asked to express any opinion about it. But the appeal of her three children was allowed. Mya Bu J., in whose judgment Braund J. concurred, said this: "Whether the suit is to be described technically as a suit for partition or as a suit for administration, it is a clear duty of the Court to declare not only what properties or shares therein formed the estate of Ko Po Cho but also to declare the rights of Ma Shwe Yu and of her children in such properties". He accordingly held that the final decree passed by the trial Court ought to be set aside and the case remanded to the trial Court for the purpose of enabling the three children to prosecute their claims and of having a proper final decree drawn up after necessary enquiries had been made. As regards such of the properties set out in the schedules to the plaint as were not dealt with by the award, he said that all that would be necessary for the District Court after the remand was to divide the interest of Ko Po Cho therein among the widow and children in accordance with the terms of the agreement of the 1st August, 1918. But as regards the properties disposed of by the award



(namely the items 1 to 19 hereinbefore mentioned) he held (a) that the three children must be given an opportunity of claiming which items or shares in items belonged to Ko Po Cho's estate, and that, after Ko Po Cho's interest in such properties had been ascertained, the three children must be declared to be entitled to half that interest upon the footing that they were entitled to that half as against their mother on her re-marriage (b) that the shares to which Ma Shwe Yu was personally entitled must be declared to be one-third of one-sixth in items 1 to 5, one-third of one-fourth in items 6 to 17, and one-third of one-third in items 18 and 19 in accordance with clause 5 of the directions in the award (c) that whatever Ma Shwe Yu was declared entitled to under the head (b) and whatever the three children were entitled to under the head (a) must then be divided in equal fourth shares among them in accordance with the terms of the agreement of the 1st August, 1918.

A formal decree was drawn up giving effect to this decision of the High Court, and it is from that decree that an appeal has been brought by Ko Sin (both in his personal capacity and as legal representative of Ma Nge Ma who has died) to His Majesty in Council.

It was urged before their Lordships upon the hearing of the appeal (and this was substantially the only point relied on by the appellant) that the suit was not one for the administration of the estate of Ko Po Cho, and that it was not therefore permissible for his three children, who were merely defendants in the suit, to have their shares in the estate ascertained and decreed to them, more especially in view of the fact that the subject matter of

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the claim of the plaintiff in the suit was not even the whole estate of Ko Po Cho but merely her share in so much of the scheduled properties as belonged to his estate. It was, the appellant contended, merely a partition suit for the recovery by the plaintiff of that share in severalty.

Their Lordships agree that the suit is not a suit for the administration of Ko Po Cho's estate. There is no claim for administration in the plaint, nor is there any claim for the accounts and enquiries usually directed in such a suit. Its subject matter moreover is not the whole of the dead man's estate but only a portion of it. But this in no way concludes the matter. The pleadings raised a distinct question between the plaintiff and her children as to their respective shares in the subject matter of the suit, and an issue was framed for the purpose of deciding that question. The preliminary decree, moreover, directed an enquiry not merely as to the plaintiff's share, but as to the entire share of Ko Po Cho in the subject matter of the suit. In these circumstances it was in their Lordships' opinion not only competent for the Court to ascertain and declare the shares of the three children of Ko Po Cho ; it was their plain duty so to do. In their Lordships' opinion the decree of the High Court should be affirmed and this appeal dismissed.

They will humbly advise His Majesty accordingly.

As the respondents have not appeared there will be no order respecting costs.

## ORIGINAL CIVIL.

*Before Mr. Justice, Sharpe in the Original Side and Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Dunkley in Appeal.*

## IN THE MATTER OF UNITED OIL MILLS, LTD.\*

1941

Jan. 13.

*In the Original Side : Companies Act, ss. 109, 116 and 120 (1)—Mortgage by Company not registered under s. 109.—Inadvertence within meaning of s. 120 (3)—Want of knowledge of the provision of the Act—Extension of time granted.*

*On appeal : Order granting extension of time to register mortgage—Whether appealable.*

*Held in the Original Side :* Omission to register a mortgage by mortgagor company or mortgagee under section 109 of Companies Act, owing to want of knowledge of the provision of law cannot be said to be accidental within the meaning of s. 120 (1) of the Act, but omission is due to "inadvertence" within the meaning of the section.

*In re Jackson & Co., Ltd., L.R. (1899) 1 Ch. 348, followed.*

Though it is the duty of the mortgagor, to register the mortgage under s. 109, yet under the last part of section 116 (1), mortgagee may also register the same. Under section 120 (1) the Court has a discretion as to whether it will grant the relief. The fact that the right of unsecured creditor would be affected or that an order for winding up of the company has been made is no ground for refusing the relief if proper case be made out.

*Held by the Appellate Bench :* That the order dealt with the management and administration of the company under Part IV of the Act and not a matter of winding up at all. It, therefore, did not come within the provision of s. 202 of the Act. The order is also not a judgment within the meaning of clause 13 of the Letters Patent.

*In re Dayabhai Jiandas v. A.M.M. Murugappa Chettiar, I.L.R. 13 Ran, 457, followed.*

The United Oil Mills Co., Ltd., created a mortgage by deposit of title deeds in favour of Haji Sattar Haji Vally Mohamed & Sons on 6th September 1934. But this mortgage was not registered by the company or the mortgagee with the Registrar of Joint Stock Companies, as required by section 109 of the Companies Act. The company created a second mortgage over its properties by a registered deed. At that time he came to know that all mortgages had to be registered with the Registrar of Joint Stock Companies. The company then applied in Civil Miscellaneous No. 166 of 1939 under s. 120 (1) for extension of time to register the mortgage on the ground that the omission to register was accidental or due to inadvertence. In Civil Miscellaneous No. 178 of 1939 three unsecured creditors made an application to wind up the company and before the disposal of the earlier application the company was ordered to be wound up and the Official

\* Civil Misc. No. 166 of 1939 in the Original Side of High Court and Civil Misc. Appeal No. 9 of 1941.



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IN THE  
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Liquidator was appointed the Liquidator. He declined to continue the application of the company filed in Civil Miscellaneous No. 166 of 1939. The 1st Mortgagee Haji Sattar Haji Vally Mohamed & Sons then made an application to be added or substituted as a petitioner in the case and they pleaded that the firm had never before lent money to any limited company and did not know that all mortgages had to be registered under s. 109 of Companies Act, and that the Managing Director of the United Oil Mills, Ltd., informed him that he was advised by his advocates that registration was necessary and that he was applying to Court for extension of time to effect registration.

*P. K. Basu* for the mortgagee.

*Dr. Rauf* for the unsecured creditors.

SHARPE, J.—This appears to me to be a case in which I ought to order the mortgagees (H.A.S.H. Vally Mohamed & Sons) to be added as petitioners in the Company's application of 5th August 1939. The mortgagees' application of 3rd October 1939 is accordingly granted to that extent, but, as they themselves could have made their own application under the last portion of section 116 (1), they must pay Mr. Rauf's clients their costs of that application of the 3rd October, advocate's fee two gold mohurs.

Now as regards the main application, that made by the Company on 5th August. It is to be remembered that that application is not an application by the mortgagees but it remains and is what it originally was, namely, an application by the Company, and I have only added the mortgagees as petitioners for the purpose of their presenting the Company's application which would otherwise lapse.

The fact of the matter is that this mortgage was not registered by the Company because its Managing Director (It is agreed that it is a one-man company) had not acquainted himself with the provisions of the Companies Act, and in particular of section 109, although it is admitted that he had been running this Company for ten years. I do not think that I can

say that the Company's" omission (which really means the Managing Director's own omission) to register this mortgage can be said to have been accidental. Was it, then, "Due to inadvertence or to some other sufficient cause"? The case is not dissimilar to *In re Jackson & Co., Ltd.* (1) and I think that I may answer that question in the affirmative. I think the omission was due to inadvertence on the part of the Company. I will and, though I do not think it really necessary for me to do so, that if I had been dealing with an application for extension of time by the mortgagees [who could themselves, under the last part of section 116 (1), have registered the mortgage] I would equally have held, after reading the affidavit of Haji Ahmed of 2nd October, that their omission to register it was due to inadvertence. If the omission of the Company itself was due to inadvertence *a fortiori* the omission of the mortgagees, who are not a company and who do not require to be well versed in company law, was due to inadvertence.

That, however, does not dispose of the matter, for the word in section 120 (1) is "may" and not "shall"; in other words the Court has a discretion as to whether it will grant the relief asked for. I must therefore consider the position of the unsecured creditors who oppose this application and who are represented before me by Dr. Rauf. They are persons who discounted hundis in April 1939. I do not think they can really complain if I extend the time for registering this mortgage. The Company might have created this mortgage on the 1st May 1939 and immediately registered it. These unsecured creditors would now be in precisely the same position

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(1) L.R. (1899) 1 Ch. 348.

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as they will be if I now extend the time. The only reason which they have adduced against my extending the time is that which appears in paragraphs 6, 7 and 8 of their Objections dated the 4th September last. It may well be that if they had known of this mortgage they would not have discounted the hundis. But they say very fairly, in paragraph 8, that the reason they discounted the hundis was because they were informed that the Company's property was unencumbered. It seems to me that, if that was their reason for discounting the hundis, then it was not a sound one, so far as their opposition to the present application is concerned. They seem to have overlooked the fact which I have already mentioned, namely, that, even if the Company's property was not encumbered at the time of their discounting the hundis, there could be no possible objection by them to the Company creating (and registering) a valid encumbrance immediately afterwards. They were never in a position to say to the Company: "We have discounted these hundis because your property was unencumbered at the time, and therefore you cannot encumber it hereafter." They could never have said that, and it seems to me that, if the Company has the right to encumber its property after April 1939 without reference to these unsecured creditors, there can really be no objection, so far as Dr. Rauf's clients are concerned, to my permitting the mortgage created prior to April 1939 to be registered after April 1939, when once I am satisfied, as I am satisfied, that the omission to register it within the specified time was due to inadvertence.

I do not overlook the fact that the Company has since been ordered to be wound up. But Shaw J. did not make his order to that effect until



4th December, and both the Company's application for extension of time (the application with which I am now dealing) and the mortgagees' application to be added as Petitioners in the Company's application were made before the winding-up order. In dealing with the present application I must take matters as they stood at the date of the filing of the application which was the 5th August 1939.

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I therefore propose to extend the time for registering the mortgage until the 1st February 1941. Sub-section (2) of section 120 of the Companies Act will come into operation automatically and I need say no more about the position of any persons who have acquired rights in respect of this property prior to the time when this mortgage is actually registered. The application filed by the Company on 5th August 1939 is accordingly granted as indicated, but the unsecured creditors who appeared on the hearing of the application must have their costs, to be paid by Mr. Basu's clients who asked to be, and who have been, allowed to prosecute the main application; advocate's fee three gold mohurs.

[The unsecured creditors Mohanlal Kalidas & Co. appealed against the above decision of Mr. Justice Sharpe in Civil Miscellaneous Appeal No. 9 of 1941 before the Appellate Bench consisting of Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Dunkley.]

*Dr. Rauf* for the appellants.

*P. K. Basu* for the respondent.

ROBERTS, C.J.—The preliminary objection taken by Mr. Basu that no appeal lies in this matter must, in my opinion, succeed.

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The facts need only be stated with brevity. They are that a company known as the United Oil Mills mortgaged to the first respondent their assets by way of a mortgage which was unregistered and which fell within section 109 of the Companies Act.

This should have been registered within 21 days, but a very long time afterwards an application was made to the learned Judge upon the Original Side and he extended the time for registration to February 1st, 1941. It is unnecessary to discuss the grounds on which he saw fit to proceed, for, as Mr. Basu has pointed out, he was dealing with a matter concerned with the management and administration of the company under Part IV of the Act and not in the matter of a winding up at all. It is true that the company had gone into liquidation, but the proceedings in the matter of a winding up were quite different from those which took place before the learned Judge. Therefore, having regard to section 202 of the Companies Act, it is quite clear that that section does not give the appellants any right of appeal.

It was, however, held in the case of *Lawrence Dawson v. J. Hormasji* (1) that apart from the right of appeal statutorily granted under section 202 of the Companies Act there might also be an appeal under clause 13 of the Letters Patent in any case in which there had been a judgment within the meaning of the decision in *In re Dayabhai Jiwandas v. A.M.M. Murugappa Chettiar* (2). But having carefully considered the matter, we have come to the conclusion that this order giving time for the registration of the mortgage cannot be regarded as one which conclusively determined the rights of any

(1) 10 Ran. 438.

(2) I.L.R. 13 Ran. 457.

of the parties, and it seems impossible to say that if this had been a suit it would have been necessary to draw up a decree.

That being so, the preliminary objection must succeed and the appeal must be dismissed with costs, advocate's fee three gold mohurs.

DUNKLEY, J.—I agree.

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## APPELLATE CIVIL.

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v.

S.A.P. ANNAMALAI CHETTYAR AND OTHERS \*<sup>c</sup>*(Joint Licensees).**Electricity Act, ss. 9 (2) and 28—Transfer by heirs of one of three joint licensees and auction sale of the interest of another—Whether invalid—effect of partnership before grant of licence—Alternative relief.*

*Held:* Where a licence to supply electric energy as granted to three persons jointly who formed a partnership known as Electric Supply Company and after the death of one of the licensees his heirs mortgaged and subsequently sold the deceased person's share in the Electric Supply Company, the transfer is not void under s. 9 (2) of the Act as the transfer is not by a licensee (which means all three licensees jointly) but by heirs of one of three joint licensees.

When the licence states that the licensee (in the singular) is the three persons and one of the three persons dies, the licence lapses as the licensee no longer exists. When all three joint licensees died the share of any one could be attached and sold in execution of a decree against the legal representatives of a joint licensee. Though the transferee from heirs or auction purchasers could not be partners with the only surviving joint licensee, yet that fact would not affect their ownership of two-third shares of the assets of the business.

If an agreement of partnership be entered into by a prospective licensee before the grant of licence with the owners of two-third shares of the assets of the business, such agreement does not fall within the scope of section 28 of the Act.

In case the licensee after the grant of licence does not implement his agreement, the owners of two-third shares of the assets are entitled to a decree for their shares of assets or value of such shares.

*Paget* for the appellant.*Hay* for the respondent.

\* Civil 1st Appeals Nos. 33 and 34 of 1941 against the decree of the District Court of Toungoo in Civil Suit No. 3 of 1940, dated the 10th February 1941.

DUNKLEY, J.—These two appeals have been heard together, as were the suits out of which the appeals have arisen; namely, Regular Suits Nos. 3 and 4 of 1940 of the District Court of Toungoo. It will perhaps make for better understanding of the questions at issue if I begin this judgment with a description of the parties.

The two appellants, Ma Daung and Maung Than, who are the appellants in both appeals, are the widow and son, and consequently the legal representatives, of one Maung Saing who died on the 2nd February, 1937. The plaintiff in Suit No. 3 was the K.P.S.A.R.P. Chettyar Firm, and that firm was joined as a *pro forma* defendant in Suit No. 4. The plaintiff in Suit No. 4 was the S.A.P. Chettyar Firm, which appears to be a joint family business consisting of a mother and son who were separately joined as plaintiffs, although the pleadings do not specifically say so. The S.A.P. Firm was joined as a *pro forma* defendant in Suit No. 3. The other party—defendants to Suit No. 3 were three minors, Ma Tin E, Maung Po Htu and Nga Kywe, who are the present legal representatives of one Soe Maung who died in September 1927. The remaining party—defendant in Suit No. 4 was Ko Lay, a minor, who is the legal representative of one Ko Maung who died in March 1936. These minor defendants, that is, Nos. 2, 3 and 4 in Suit No. 3 and No. 3 in Suit No. 4, did not enter an appearance or contest the suits and it was really unnecessary to join them as parties to these appeals. The two Chettyar firms admitted each other's claim and the suits were contested only by the appellants.

On the 5th November 1924, Maung Soe Maung, Ko Maung and Maung Saing jointly obtained a licence (Exhibit A) for the supply of electrical

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energy to the public within the municipal area of Pyu. They were "partners in equal shares in this undertaking, each contributing a sum of Rs. 11,600 to the capital. The undertaking was known as the Pyu Electric Supply Company, and this undertaking has been continued since that date until the present time, although at certain stages its operations were illicit as not being covered by a licence as required by the Electricity Act of 1910. In the original licence the expression "licensee" was defined in clause 2 (ii) as follows: "The expression 'licensee' shall mean and include the said Maung Soe Maung, Ko Maung and Maung Saing and their permitted assigns and nominees". It is common ground that the use of the word "permitted" in this definition means an assignee or nominee the transfer to whom has been made with the consent in writing of the Government of Burma under section 9 (2) of the Electricity Act, and as no such assignment or nomination with the consent of Government was ever made, that part of the definition has no significance; but the definition is of importance for the purposes of this litigation in that the licensee (in the singular) consists under this definition of three persons jointly.

Now, as I have said, Maung Soe Maung died in September 1927. At the time of his death he was indebted on a mortgage of paddy land and certain promissory notes to the K.P.S.A.R.P. Firm, and after his death his heirs, by a deed of mortgage dated the 21st November 1927 (Exhibit D), borrowed additional money and re-mortgaged this paddy land and also U Soe Maung's one-third share in the partnership known as the Pyu Electric Supply Company. The heirs were unable to redeem this mortgage, and by a deed of sale dated the



[17th June 1929 (Exhibit K), they transferred the mortgaged property outright to the K.P.S.A.R.P. Firm in satisfaction of the mortgage debt. The only item of the property sold which is concerned in this litigation is the 7th item, which is described as follows :

" Land measuring '650 of an acre being Holding No. 27 of 1923-24, plot No. 150, in Railway Station Quarter, Pyu Town lands, and the electric power shed built thereon, 6 by 4 posts corrugated iron roof and walls, one Bolinders electric power engine of 50 horse power and one 30 horse power engine, i.e. two engines, one dynamo capable of giving electric energy for 1,500 lamps, one dynamo of energy 1,000 lamps, all kinds of machinery and accessories together with all kinds of lamp posts, lamps electric wires connected with the said power station and distributed over the town, i.e. the whole group of properties known as the Pyu Electric Company. \* \* \* So U Soe Maung's one share of the capital, properties and profits is conveyed and sold."

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An attempt was made in the argument before us, and before the learned District Judge, to attack this transfer under the provisions of section 9 (2) of the Electricity Act, it being urged that this transfer was void because it was not made with the previous consent in writing of the Government of Burma. There is no force in this contention and, in my opinion, the provisions of the Electricity Act really have little or no bearing on these cases. The transfer was not made by a licensee but was made by the heirs of a deceased licensee or, to be more accurate, the heirs of one of the three joint licensees, and there is nothing in section 9 (2) which forbids such a transfer. The parties appear to have agreed that this licence of 1924 for the supply of electric energy at Pyu continued to exist until the last of the three joint licensees died, and they

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appear to have adopted this view because after the death of Maung Saing the Government of Burma issued notification stating that the licence had lapsed owing to the death of the licensees ; but in my opinion that is not a correct construction of the provisions of the licence. As I have just pointed out, the licence states that the licensee (in the singular) is the three persons, and hence as soon as one of these persons died the licensee no longer continued to exist. Consequently, the licence really lapsed upon the death of Maung Soe Maung, and on this ground also the provisions of the Electricity Act could have no application to the transfer of Soe Maung's interest to the K.P.S.A.R.P. Firm after Soe Maung's death.

After this transfer the business of the Pyu Electric Supply Company continued to be carried on by Ko Maung and Maung Saing, and the account books show quite clearly that the allegation of the K.P.S.A.R.P. Firm that they were taken into the business either as co-owners or as partners is correct. They appeared in the account books as owners of one-third share of the capital and they received annually a one-third share of the profits. It is urged that this inclusion of the K.P.S.A.R.P. Firm in the partnership was contrary to the provisions of section 28 (1) of the Electricity Act and void, this argument being based on the assumption that the licence still continued in force. Assuming that to be so, this fact can have no effect whatever on the K.P.S.A.R.P. Firm's ownership of one-third of all the property used in the undertaking and in the possession of Ko Maung and Maung Saing as the persons who were actively carrying on the business. The transfer of this one-third share to the K.P.S.A.R.P. Firm was a valid transfer, and the title

of the firm thereto was never denied, and, in fact, was always openly acknowledged by Ko Maung and Maung Saing, and consequently no question of limitation of a claim to its recovery could arise, and the K.P.S.A.R.P. Firm throughout had a right to claim for the recovery of their one-third share of this property or its value at any time.

Ko Maung died in March 1936. When he died he was considerably indebted, and suits were brought against his heirs and legal representatives and money decrees were passed, and in execution of these decrees Ko Maung's one-third share in the Pyu Electric Supply Company was attached and brought to sale. The sale took place on the 6th February 1937, and at the Court auction this one-third share of the Electric Supply Firm's assets was bought by a person named Kannappa. Kannappa sold this one-third share to the S.A.P. Firm by a registered deed on the 15th May 1937. In this way the S.A.P. Firm became the owners of Ko Maung's share in the Pyu Electric Supply Company. It is important to record that Maung Saing died on the 2nd February 1937, that is, before the Court sale took place, because, whatever may be the correct view of the terms of the licence of 1924, without doubt the licence lapsed at least on the death of Maung Saing, no licensee remaining in existence. Consequently, the Court sale to Kannappa and the subsequent sale by Kannappa to the S.A.P. Firm are not hit by any provision of the Electricity Act.

After Maung Saing's death all the assets of the Pyu Electric Supply Company appear to have passed under the control of one Pan Maung, another brother, who continued without licence to supply electricity in the Pyu Municipality, and after

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Pan Maung had carried on the business for a few months it was taken over by the appellants Ma Daung and Maung Than, who, as I have said, are the widow and son of Maung Saing, and since 1937 they have been in physical possession of the whole of the property utilized in carrying on this undertaking and have carried on the undertaking themselves. They obtained from the Government of Burma a temporary licence in their names in August 1937, and they then applied for a permanent licence on the 18th September 1937, and a permanent licence was granted in their names as licensees on the 4th July 1938. It is the contention of the two Chettyar firms that there was an agreement between them and the appellants that the Pyu Electric Supply Company should be conducted as a partnership of the four of them, and that within two months after the permanent licence had been issued the appellants would take all necessary steps to obtain the consent in writing of the Government of Burma for the addition of the names of the two Chettyar firms as licensees and for their inclusion in the partnership. The appellants deny that there was any such agreement, and it is now alleged that if there were any such agreement it was void under the provisions of section 28 of the Electricity Act.

Of course, that agreement does not fall within the scope of section 28, because the case of both the Chettyars is that the agreement was entered into before any licence was obtained at all and while the supply of electricity in Pyu was being continued without a licence. The case of the Chettyar firms is that they allowed the appellants to be in physical possession of all the property of the electric supply company and carry on the business, utilizing the property belonging to them (*i.e.* the two Chettyars),

on the appellants' undertaking to take the Chettyars into a legally constituted partnership with them. The appellants deny that there was ever any such arrangement, but the learned District Judge has found this fact against the appellants and his decision on this question of fact was undoubtedly correct. The Chettyars set up that they entered into this arrangement with Ma Daung and they called evidence in corroboration of their own statements on this point, but Ma Daung failed to go into the witness-box to deny it. She put forward her son Maung Than to give evidence for himself and on her behalf and his admissions are binding on both the appellants. A copy of Maung Than's deposition in the Court of the Township Magistrate of Pyu on the 15th September, 1938, has been put in (Exhibit 2V), and in the course of this deposition he stated as follows :

"The Pyu Electric Supply was founded by three partners, viz. U Saing (deceased), U Soe Maung (deceased) and U Maung (also deceased). U Soe Maung's share is now in the hands of K.P.S.A.R.P. and U Maung's share is now in the hands of S.A.P. Firm."

It is therefore not open to the appellants to deny that the two Chettyars were in possession of these two one-third shares at the time when Maung Than made this statement. Moreover, from the dates of their respective purchases the two Chettyars were furnished by the continuing licensees annually with audited statements of accounts of the business and were paid their respective shares of the profits. In July of 1937 Maung Than supplied them with an audited statement of accounts for the year 1936-37, thereby acknowledging their interests in the business. In that year the accounts showed a

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loss in the working of the year and there were no profits to be distributed.

When the appellants took no steps to have the Chettyars included in the licence or to make them partners in the business, then the Chettyars launched these suits. The complaints in the two suits are in almost identical terms, and the complaint regarding these complaints which the appellants made in the first paragraph of their written statements, namely, "These defendants are much embarrassed by the irrelevant matters pleaded in the complaint and by its lengthy and diffuse nature", were amply justified. The complaints are exceedingly long. They contain much recital of the evidence on which the plaintiffs intended to rely to prove their cases and a good deal of legal argument, and it seems clear that the learned advocate who drew up these complaints was uncertain in his mind as to what was the real cause of action of the plaintiffs and was therefore determined to plead everything which could possibly have any bearing upon a claim which he no doubt felt to be justified. The learned District Judge is to be congratulated on the ingenuity with which he has disentangled the real cause of action from this mass of irrelevant matter. In his judgment he has said :

"This suit as well as suit No. 4 were brought by the plaintiffs for the purpose of recovering a third share each of the property shown in schedules or its value Rs. 12,600 and profits Rs. 1,400 or, in the alternative, they sued for dissolution of partnership and accounts."

The complaints state that the cause of action arose in September 1938 when the appellants failed to recognize the Chettyars as partners and co-licensees and also deprived them of their possession of the properties in the schedule. The schedules attached



to the complaints are exactly the same. They set out the property with which the business of the Pyu Electric Supply Company had been, and was being, carried on, and in connection with this it is necessary to mention that although the original shares of capital were Rs. 11,600, these were subsequently increased by Rs. 1,000 by the purchase of a new engine at a cost of Rs. 3,000 which was shared in equal proportions by the two Chettyars and Maung Saing.

From the complaints it is clear that the Chettyars did not rely on any partnership. They prayed, in the alternative, that if against their contention it was held that there was or had been a partnership in which they were partners then there might be a decree for dissolution and accounts. No doubt, up to the death of Maung Saing the Chettyars were looked upon as partners in this business and were furnished with accounts and paid their shares of the profits as such. This is clear from the form of the annual balance sheets, which have been filed for a considerable number of years. But the fact that the Chettyars could never be partners, and that the agreements to admit them as partners after they had respectively purchased the shares of Maung Soe Maung and Ko Maung were void, does not affect their ownership of the one-third shares of the assets of the business which they had legally purchased, and during the whole of this period up to Maung Saing's death the position was that with their consent first Ko Maung and Maung Saing jointly and subsequently Maung Saing alone were using the Chettyars' property for the purpose of carrying on the business. When Maung Saing died and the licence lapsed the position was that the assets of the business belonged in equal shares to Maung Saing's heirs (*i.e.* the

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appellants) and to the K.P.S.A.R.P. and S.A.P. Firms. The two Chettyars then agreed to allow the appellants to apply for a new licence in their own names and to continue to carry on the business on their undertaking that within two months of the issue of a permanent licence they would endeavour to obtain the consent in writing of the Government of Burma to a partnership with the two Chettyars and to the addition of the two Chettyars' names to the licence. When the two appellants failed to implement this undertaking and took no steps, whatever in the matter, but on the contrary asserted a right in themselves to the whole of the property, then the cause of action of the Chettyars arose for the recovery of their property from the appellants, and, in my opinion, the plaintiffs have rightly stated that the cause of action arose in September 1938.

It is urged on behalf of the appellants that for this breach of agreement by the appellants the only remedy is a suit for damages, but it is impossible to accede to this proposition. The Chettyars allowed the appellants to use their property on a certain undertaking, and when the appellants failed to carry out that undertaking the Chettyars must have a right of suit for the recovery of their property *plus* reasonable interest for the use thereof, and that is the main relief which is asked for in the plaint, the first prayer being for "delivery of one-third share of the properties in schedule A or its value Rs. 12,600, with profits arising therefrom as the plaintiff may be found entitled to". The two Chettyars and the appellants were the joint owners of this property. The appellants have now denied the right of the two Chettyars thereto, that is, they have denied that they are co-owners with them. Consequently, on such denial the Chettyars had



a right to bring the suits, for the recovery of their shares.

The learned District Judge has after enquiry valued the shares at Rs. 8,000 each, and he has awarded interest at the rate of 6 per cent per annum on this amount from the 1st April 1939 to the date of realization. There have been cross-objections alleging that this sum of Rs. 8,000 is an under-valuation and that the valuation should be Rs. 12,600, this being in accordance with the entries in the annual balance sheets of the capital of the undertaking. Profits up to the date of suit at Rs. 1,400 have also been claimed.

Now, so far as the sum of Rs. 12,600 is concerned, that is the sum which had been put into the undertaking by each of the partners or co-owners, Rs. 11,600 in the first instance and then an additional Rs. 1,000 each when the new engine was purchased; but there must be some allowance for depreciation, and it is urged that the depreciation allowed by the learned District Judge is excessive. The learned District Judge has, however, heard evidence in regard to the present value of the assets of the undertaking and has come to the conclusion on that evidence that Rs. 24,000 is a fair estimate of the net value. I am not disposed to question his decision on this point of fact, for, clearly, the share of each of the plaintiffs must be some sum less than Rs. 12,600, and the evidence does not convince me that it ought to be more than Rs. 8,000, especially when it is borne in mind that the major portion of this property has been in constant use since the year 1924. In my opinion, therefore, we should not be justified in disturbing the finding of the learned District Judge on this point.

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As regards profits, it is impossible for the Chettyars to question the decision of the learned District Judge on this point, for there is no evidence to show that the undertaking has earned any profit since the licence to the appellants was issued, and from the accounts it appears that the Chettyars obtained their shares of the profits up to the last year in which the balance sheet showed any profit. The decision of the learned District Judge, therefore, to allow interest on the value of the Chettyars' shares was correct.

The decree has been rightly drawn in the alternative, that is, that the appellants must either deliver to each of the plaintiffs a one-third share of the assets as such, or that they must pay to each of the plaintiffs the sum of Rs. 8,000 as the value of that share *plus* interest. It is complained that in the first part of this decree the learned District Judge has directed that the plaintiffs on taking over a one-third share of the actual properties shall pay to the appellants a proportionate share of the loss account as shown in the last balance sheet. I am unable to understand how this decision can be challenged. The balance sheets have not been questioned and they show this loss. During the many years in which a profit was made the Chettyars received their share of profits and, consequently, if they are now going to bring the undertaking to an end by taking their shares out of it, surely it is only right that they should pay their respective shares of the losses which have been incurred in the working of the undertaking during the time that it has been carried on by the appellants.

The result therefore is that both these appeals and also the cross-objections fail. The cross-

objections were all of a minor character and need hardly have been made. They are dismissed without costs. The appeals are dismissed with costs in favour of the 1st and 5th respondents in Appeal No. 33 and the 1st, 2nd and 4th respondents in Appeal No. 34. As these respondents were represented by one advocate only in each appeal, there will be only one set of costs in each appeal.

MYA BU, J.—I agree.

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## SPECIAL BENCH.

*Before Mr. Justice Mya Bu and Mr. Justice Sharpe.*

1941

Dec. 2.

## IN THE MATTER OF A HIGHER GRADE PLEADER.\*

*Disciplinary action against pleader—Holding of valid certificate for practise essential—Holding expired certificate is not "holding a certificate"—Conviction of pleader under the Defence of Burma Act—Pleader holding valid certificate—Expiration of certificate at date of proceedings—Legal Practitioners' Act, ss. 12, 13.*

Disciplinary action either under s. 12 or s. 13 of the Legal Practitioners' Act can be taken only against a pleader who holds a valid and current certificate, without which he is not entitled to practise in a Civil Court or Revenue office. A pleader cannot be proceeded against under s. 12 of the Act following on his conviction for offences under the Defence of Burma Act committed whilst he held a certificate which had expired and had not been renewed. The words "holding a certificate" in s. 12 cannot be interpreted as including the holding of an expired certificate.

*E Maung* (Government Advocate) for the Crown.

*Chan Htoon* for the respondent.

MYA BU and SHARPE, JJ.—This is a proceeding taken by this Court, purporting to act under section 12 of the Legal Practitioners' Act, against a Higher Grade Pleader whose number in the Roll of Higher Grade Pleaders is 770. He was admitted as a Higher Grade Pleader in 1927, and held a certificate authorizing him to practise up to the end of the year 1940. During the course of that year he committed offences punishable under various provisions of the Defence of Burma Act, and, on the 26th of August last year, he was sentenced to nine months' rigorous imprisonment in respect of those offences. On the 30th of September, 1940, he duly applied, in accordance with Rule 16 of the Pleaders' Admission Rules, 1928, to the Chief Judge



of the Small Cause Court, Rangoon, for a renewal of his certificate. His application for renewal was refused, and a letter informing him of that fact was sent on the 11th November, 1940, by the Registrar of the Small Cause Court, Rangoon, addressed to the pleader at the Central Jail, Insein, where he was then undergoing the term of imprisonment passed upon him. On the 2nd June of the present year, after he had been discharged from the jail, he wrote a letter to the Registrar of this Court stating that his previous application had been refused by the Chief Judge of the Small Cause Court and asking for a renewal of his certificate. The next thing that happened was the institution of the present proceeding.

U Chan Htoon, appearing on behalf of the pleader, raised the point that as the pleader has not yet had his certificate renewed he cannot be said now to be holding a certificate and accordingly, as section 12 of the Legal Practitioners' Act provides that the High Court may only suspend or dismiss any pleader "holding a certificate" issued under section 7 of that Act, the present proceedings under section 12 are misconceived. This point commended itself to us, but we thought it advisable for us to have the benefit of the views of the Advocate-General in this matter, and so we issued notice to him and caused him to be supplied with copies of the necessary documents in the case.

U E Maung has now appeared before us on behalf of the Advocate-General, and he too states that unless the pleader in question holds a certificate issued under section 7 the High Court cannot suspend or dismiss a pleader under section 12 of the Legal Practitioners' Act. There can be no doubt of the correctness of this proposition unless

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the words "holding a certificate" in section 12 can be interpreted as including the holding of an expired certificate. The question for consideration therefore is whether the fact that the pleader still holds an expired certificate enables this Court to proceed to consider whether it should suspend or dismiss him. We do not think that it does. The first clause of section 7 of the Act provides that, on the admission of any person as a pleader, the High Court shall cause a certificate to be issued to such person authorizing him to practise up to the end of the current year. The second clause of section 7 provides for the renewal of the certificate upon the expiration of the period of the currency of the certificate issued under the first clause. Because the words "the holder of the certificate" appear in the second clause of section 7 we have wondered whether it is possible that these words may include the holder of an expired certificate, as that section provides that, at the expiration of the period for which the certificate is granted, the holder of it shall be entitled to have it renewed. Inasmuch as a certificate which is renewed under this provision of the Act clearly commences to be effective from the very moment at which the previously granted certificate expires and there is thus no period of time during which the pleader holds an unrenewed expired certificate under this section, we do not think that anything in the second clause of section 7 can lead to the conclusion that the words "holding a certificate" in section 12 include holding an unrenewed expired certificate. Corollarily we think that the words "holding a certificate" in section 12 mean holding a valid current certificate. As in the present case the pleader does not hold a valid current certificate we are of the opinion that the present proceedings cannot be sustained.



There is a further reason which makes us think that disciplinary action, either under section 12 or section 13 of the Act can be taken only against a pleader holding a valid current certificate, namely, that without such a certificate the pleader is not entitled to practise as such in any Court. There is good ground for thinking that it was not within the contemplation of the Legislature to bring under the disciplinary control of the High Court those who do not enjoy the ordinary privileges of a legal practitioner by practising in the Courts and Revenue offices.

Unless and until the pleader in question obtains a valid current certificate, no proceeding can be taken against him under section 12 of the Legal Practitioners' Act. The pleader in the present case is desirous of becoming the holder of a valid current certificate. We are not now concerned with the question whether his application to this Court for a renewal of his certificate should or should not be granted. If his application be granted and he does get his certificate renewed, this Court may then, if it deems fit, issue a notice to him under section 12, as it has purported to do in the present proceedings; while, if the pleader's application for a renewal of his certificate be rejected by this Court, it will be for the pleader to consider what further steps, if any, he should take to obtain a renewal of his certificate. In our judgment the respondent has shown sufficient cause why his name should not now be struck off the register, and the present proceedings should therefore now be closed.

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## APPELLATE CRIMINAL.

*Before Mr. Justice Ba U and Mr. Justice Wright.*

1946

May 1.

THE KING *v.* MAUNG PO.\**Penal Code, s. 84—Burden of proof—Question of sentence.*

*Held:* Burden of proving defence of insanity lies upon the accused, not only from the point of view of introducing evidence, but also from the point of view of establishing the defence clearly.

*Reg. v. McNaughten*, (1843) 4 St. Tr. (N.S. 847), followed.

The defence can rely upon anything appearing in the prosecution evidence.

*Woolmington v. The Director of Public Prosecutions*, (1935) A.C. 46.  
*King-Emperor v. U Damapala*, I.L.R. 14 Ran. 666, referred to.

Youth, lack of motive and queer behaviour are given due consideration on the question of sentence.

*Chan Tun Aung* (Government Advocate) for the applicant.

*Kya Gaing* for the respondent.

WRIGHT, J.—The accused Maung Po has been convicted by U Tha U, Special Judge, Kyaukse, under section 302 of the Penal Code for causing the death of U Moe Gaung and sentenced to death. He has also been convicted under section 324 of the Penal Code for causing hurt to Ma Ei and sentenced to undergo three months' rigorous imprisonment. The case is before us for review under section 6 (2) of the Special Judges Act, 1943.

It is not denied that the accused Maung Po cut his father-in-law U Moe Gaung and thereby caused his death. There is ample evidence to establish that he

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\* Criminal Reference No. 16 of 1946, Criminal Review No. 123 (Special Judges Act) of 1946 against the order of U Tha U, Special Judge of Kyaukse, in his Criminal Regular Trial No. 15 of 1946.

did cut him in broad day-light in the presence of several people. This is supported by the evidence of Ma Ei (P.W. 1) and Ma Tin Mya (P.W. 2). The medical evidence shows that, among other injuries, the deceased had a cut on the neck completely severing the third cervical vertebra, the spinal cord and all the soft parts underneath. The offence was therefore undoubtedly murder, unless any special circumstances are shown to have existed.

The only defence in this case is that the accused is covered by the exception in section 84 of the Penal Code. This is in the following terms :

"Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

Now the burden of proving this defence lies upon the accused, not only from the point of view of introducing evidence, but also from the point of view of establishing the defence clearly, *vide* the case of *Reg. v. McNaughten* (1). A defence of insanity was expressly excepted from the decisions in the cases of *Woolmington v. The Director of Public Prosecutions* (2) and *King-Emperor v. U Damapala* (3). The defence can of course rely upon anything appearing in the prosecution evidence.

In support of this defence, evidence has been called to show that some time before the occurrence the deceased U Moe Gaung and the accused Maung Po cut down a banyan tree which was reputed to be the residence of a *nat* and that in consequence Maung Po acted queerly. One of the prosecution witnesses also tends to support this. The evidence is to the effect

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(1) (1843) 4 St. Tr. (N.S.) 847.

(2) (1935) A.C. 462.

(3) I.L.R. 14 Ran. 666.

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that the accused "sometimes used to talk without sense", "was not like before in his behaviour and mind", "his mind was not in proper order". It is also pointed out that the accused and the deceased were living together on good terms and that no motive has been established for the crime. On these grounds it is contended that the accused should be acquitted under section 84 of the Penal Code.

No motive has been properly established in this case, although it appears in the evidence that U Moe Gaung had beaten his daughter Ma Tin Mya, the wife of the accused, with a slipper and scolded her on the morning of the occurrence. There is nothing to show that the accused knew of this and the evidence suggests that even if he had known of it he would not have taken any objection to it. The evidence shows that the accused was living together with the deceased and was on good terms with him.

There is evidence to the effect that the accused had been tending cattle just before the offence. He did not say anything at the time of the assault and ran away after cutting U Moe Gaung. He is not alleged to have acted in an unusual manner at or about the time of the occurrence, beyond the fact that he did cut U Moe Gaung and Ma Ei.

Taking all the evidence and the circumstances into consideration and on the assumption that the defence evidence is trustworthy, I have no doubt that they fall very far short of establishing that at the time of the assault Maung Po was, by reason of unsoundness of mind, incapable of knowing what he was doing or that it was wrong. The very fact that he ran away tends to suggest that he knew that he had done wrong. I therefore consider that the accused's defence was correctly rejected by the learned Special Judge and that the accused was rightly convicted of murder.



The question of sentence remains. The accused is aged 18. There appears to be no doubt that the accused was living together amicably with U Moe Gaung. No motive has been established for the crime and it is quite possible that Maung Po was a little queer, probably owing to his apprehensions as to what might happen to him for having cut down and burnt the banyan tree. On the whole I think that these points together are sufficient to entitle us to reduce the sentence of death to one of transportation for life.

I would therefore confirm the convictions of the accused under sections 302 and 324 of the Penal Code, but set aside the sentence of death under section 302 and in place thereof sentence the accused to transportation for life, this sentence and the sentence of three months' rigorous imprisonment under section 324 of the Penal Code to run concurrently.

BA U, J.—I agree.

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## APPELLATE CIVIL.

*Before Mr. Justice Mosely.*

K.S.A.K. RAMAN CHETTIAR

v.

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1941

Dec. 2.

*Assignment of future rents and profits of immovable property—Registered instrument necessary—Assignment of arrears of rents or accrued rents—Actionable claim—Registration unnecessary—Registration Act, ss. 2 (6), 17 (1)—Burma General Clauses Act, s. 2 (29).*

It is only in the case of future rents and profits of land that the assignment must be by registered deed, and not in the case of an assignment of arrears of rents or rents that have accrued, which is merely an assignment of an actionable claim. The definition of immovable property in s. 2 (6) of the Registration Act follows the definition in the Burma General Clauses Act so that an assignment of accrued rents cannot be one of immovable property which is compulsorily registrable by s. 17 (1) of the Registration Act.

*Damodar Das v. Girdhari Lal*, I.L.R. 27 All. 564; *Daw Yon v. U Min Sin*, [1940] Ran. 7; *Mangalaswami v. Pillai*, I.L.R. 34 Mad. 64; *M. E. Moola & Sons, Ltd. v. Official Assignee, Rangoon*, I.L.R. 14 Ran. 400 (P.C.); *Sheogobind Singh v. Gouri Prasad*, I.L.R. 4 Pat. 43; *Venkaji v. Desai*, I.L.R. 19 Bom. 663, referred to.

*Chari* for the appellant.

*Chahl* for the respondent.

MOSELY, J.—This appeal must clearly succeed. The plaintiff-appellant was the assignee from the landlord of the lease of certain paddy land executed by the defendant-respondent, the tenant. The lease was executed in February 1939 for one year and the assignment was of rents already accrued and due for the year 1939-40, the assignment having been executed in July 1940.

The trial Court gave a decree for 454 baskets of paddy or its value Rs. 499 with proportionate costs.

\* Civil 2nd Appeal No. 168 of 1941 from the judgment of the District Court of Thaton in Civil Appeal No. 5 of 1941.

In appeal the learned District Judge quoted the case of *Daw Yon v. U Min Sin* (1) a decision of my own. The learned Judge was evidently misled by the headnote there. The headnote should have read, "An assignment of *future* rents and profits of land is a transfer of immovable property". This follows on the definition given in the General Clauses Act by which immovable property includes benefits *to arise* out of land, as is found at pages 9 and 11.

The learned advocate for the appellant here has quoted other cases not cited in that judgment which show clearly that it is only in the case of future rents and profits that the assignments must be by registered deed, whereas an assignment of arrears of rents or rents that have accrued is an assignment of an actionable claim. See the decision of their Lordships of the Privy Council in *M. E. Moola & Sons, Ltd. v. The Official Assignee of Rangoon and others* (2), and the case cited therein, *Mangalaswami v. Subbia Pillai* (3) which follows *Damodar Das v. Girdhari Lal* (4), *Venkaji Babaji Naick v. Ramapa Delapa Desai* (5), and see also *Sheogobind Singh v. Gouri Prasad* (6). It may be noted that the definition of immovable property in section 2 sub-section 6 of the Registration Act follows the definition in the General Clauses Act, so that an assignment of accrued rents cannot be one of immovable property which is compulsorily registrable by section 17 (1) of the Registration Act.

This appeal will accordingly be allowed and the decree of the trial Court restored with costs throughout.

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(1) [1940] Ran. 7.

(2) [1936] I.L.R. 14 Ran. 400.

(3) [1910] I.L.R. 34 Mad. 64.

(4) (1905) I.L.R. 27 All. 564.

(5) (1894) I.L.R. 19 Bom. 663.

(6) (1924) I.L.R. 4 Pat 43.



## APPELLATE CIVIL.

*Before Mr. Justice Ba U.*

1941

Aug. 22,

MA KHA v. S. I. ISPAHANY.\*

*Registration Act, sections 32, 33, 34, 35, 52, 58, 59 and 60—Rule 96 of Registration Rules—Procedure relating to registration—Power-of-attorney executed before and authenticated by an officer who holds a dual office of a Magistrate and a Sub-Registrar.*

*Held* : If there is a defect in the procedure relating to the registration of a document, it is not fatal to the validity of the document.

*Jambu Prasad v. Muhammad Aftab Ali Khan*, 37 All. 49; *Sitaram Lazmanrao Kadam v. Dharmasukhram Tanrukham Tripathi*, 51 Bom. 971; *Sateendranath Chaudhuri v. Jateendranath Chaudhuri*, 63 Cal. 1 and *Mul Raj v. Rahim Bakhsh*, 20 L. 255, followed.

*Held* : A power-of-attorney executed before and authenticated by an officer who holds a dual office of a Magistrate and a Sub-Registrar is a valid power-of-attorney even if that officer signs and authenticates the power inadvertently as a Magistrate and not as a Sub-Registrar; and consequently a mortgage deed executed by that agent under that power-of-attorney and duly registered is valid.

*Sah Mukhun Lall Panday v. Sah Koondun Lall*, 15 B.L.R. 288, followed.

*Beecheno* for the appellant.

*P. K. Basu* for the respondent.

BA U, J.—The facts of this case are simple but a point of law of some complexity arises therefrom for decision.

Mohamed Cassim, husband of the defendant-appellant Ma Kha, owed one Ajam Esoof Kadwa a sum of over Rs. 24,000. On the intervention of some elders Kadwa agreed to accept Rs. 16,750 in full discharge of the debt. Of this sum of Rs. 16,750 one B. Ramesar agreed to pay Rs. 15,000 and

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\* Civil 2nd Appeal No. 43 of 1941 against the decree of the District Court of Myitkyina in Civil Appeal No. 41 of 1940 arising out of Civil Suit No. 6 of 1939 of the Subdivisional Court of Myitkyina.

Rajabali, witness No. 4 for the plaintiff-respondent, agreed, to pay the balance Rs. 1,750 on behalf of Mohamed Cassim. Subsequently the defendant-appellant granted a power-of-attorney to Rajabali authorizing him to mortgage a house of hers and pay the amount Rs. 1,750 to Kadwa. As her attorney Rajabali borrowed a sum of Rs. 1,750 from the plaintiff-respondent on the security of the house in suit and executed a mortgage deed and presented it for registration to the Sub-Registrar. The present suit was instituted to recover Rs. 3,094 alleged to be due as principal and interest on the said mortgage.

The suit was defended mainly on the ground that the mortgage was void and of no effect inasmuch as it was presented for registration by a person not appointed as an attorney in the manner laid down in section 33 of the Registration Act. This plea was not accepted by either the trial Court or the Court of Appeal and the suit was decreed as prayed with costs. The case has therefore been brought up to this Court on second appeal and the same point that was raised in the lower Courts has now been raised again for decision. The point in question must be decided with reference to sections 32 and 33 of the Registration Act. Section 32 provides, *inter alia*, as follows :

" . . . every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration-office—

- (a) by some person executing or claiming under the same,
- or
- (b) by the representative or assign of such person, or
- (c) by the agent of such person, or representative or assign, duly authorized by power-of-attorney executed and authenticated in manner hereinafter mentioned."

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Now, under this section a document, whether the registration of which is either compulsory or optional, can be presented for registration by the following classes of people, namely,—

- (a) by a person executing it ;
- (b) by a person claiming under it ;
- (c) by a representative or assign of the person executing it ;
- (d) by a representative or assign of the person claiming under it ;
- (e) by an agent of any of the four classes of persons set out above provided he is authorized to present a document for registration by a power-of-attorney executed and authenticated in the manner indicated in the Act.

This is the plain meaning of section 32 of the Registration Act. This is made clearer by sections 34 and 35 of the Registration Act. Applying this then to the facts of a concrete case we get this result : *A* executes a mortgage deed mortgaging a piece of land belonging to *C* in favour of *B*, it is *A* or *B* or their representative or assign or their agent who can present the mortgage deed for registration. Whether *A* has power to mortgage the land of *C* to *B* or not is a matter which does not come in for discussion in connection with the registration of the mortgage deed. If neither *A* nor *B* nor any of their representatives or assigns presents the mortgage deed for registration but their agent does it, then he must have a power-of-attorney executed and authenticated in the manner laid down in section 33 of the Registration Act. Quoting what is relevant to the purpose in hand, section 33 runs as follows :



"(1) For the purposes of section 32, the following powers-of-attorney, shall alone be recognized, namely :

- (a) If the principal at the time of executing the power-of-attorney resides in any part of British Burma in which this Act is for the time being in force a power-of-attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides."

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In order to make a power-of-attorney a valid document it must be executed by the principal before the Registrar or the Sub-Registrar within whose district or sub-district he resides and it must be authenticated by the said officer. After the execution and authentication an endorsement as prescribed in sections 52 and 58 of the Registration must be made by the Registrar or Sub-Registrar as the case may be and the said officer must sign and certify the document in the manner laid down in sections 59 and 60 of the Registration Act. Thereafter necessary entries relating thereto must be made in Book VI, *vide* Rule 96 of the Registration Rules. If there is a defect in the procedure relating to the registration of a document, it is not fatal to the validity of the document. That this, I think, is the correct interpretation of the law relating to the presentation and registration of a document is borne out by judicial pronouncements in the following cases :

*Jambu Prasad v. Muhammad Aftab Ali Khan* (1); *Sitaram Lazmanrao Kadam v. Dharmasukhram Tanrùkhram Tripathi* (2); *Sateendranath Chaudhuri v. Jateendranath Chaudhuri* (3) and *Mul Raj v. Rahim Bakhsh* (4).

(1) 37 All. 49 at 56.  
(2) 51 Bom. 971.

(3) 63 Cal. 1.  
(4) 20 L. 255.

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Now, in the present case Rajabali is the person who executed the mortgage deed in suit and he is the person who presented it to the Sub-Registrar of Myitkyina for registration. Therefore, so far as the registration of the said mortgage is concerned, it must be held to have been done according to law but where the difficulty arises is this. When Rajabali executed the mortgage deed, he did it under a power-of-attorney granted to him by the defendant-appellant Ma Kha. The power is not available now. It was lost while it was in the possession of a lower grade pleader, Mr. M. N. Sen witness No. 3 for the plaintiff-respondent. No entries relating to this power were also made in Book VI as they should have been. The reason why they were not made is given by U Sein Hman, P.W. 8, as follows :

"I was Sub-Registrar for Myitkyina from 1932 to 1935, and I was stationed at Myitkyina then. The document marked exhibit (A) was registered by me. It was a simple mortgage deed. It was executed by one Rajabali for Ma Kha. It was presented for Registration by Rajabali on the strength of the power-of-attorney duly authenticated by H.Q.M., Myitkyina. I was H.Q.M. also at the time . . . . There is a register recording the authentication of powers maintained in the office of the Sub-Registrar. I do not think the power in question was recorded in the authentication in the office of the Sub-Registrar as it was authenticated by the H.Q.M."

Though it was not entered in Register No. VI, it was, according to U Sein Hman's successor U Hla Tin, entered in Index Book No. 2 for Book No. 1.

Now, the question is whether a power-of-attorney executed before and authenticated by an officer who holds a dual office of a Magistrate and a Sub-Registrar must be held to be an invalid power-of-attorney if that officer signs and authenticates the power

inadvertently as a Magistrate "and not as a Sub-Registrar.

In *Sah Mukhun Lall Panday v. Sah Koondun Lall* (1), Sir Barnes Peacock, in delivering the judgment of the Privy Council, made the following observations :

In considering the effect to be given to section 49, that section must be read in conjunction with section 88, and with the words of the heading of part X, 'Of the Effects of Registration and Non-Registration'. Now, considering that the registration of all conveyances of immovable property of the value of Rs. 100 or upwards is, by the Act, rendered compulsory, and that proper legal advice is not generally accessible to persons taking conveyances of land of small value, it is scarcely reasonable to suppose that it was the intention of the legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of section 19, 21, or 36, or other similar provisions. It is rather to be inferred that the legislature intended that such errors or defects should be classed under the general words 'defects in procedure' in section 88 of the Act, so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer, on whom they would naturally place reliance. If the registering officer refuses to register, the mistake may be rectified upon appeal under section 83, or upon petition under section 84, as the case may be ; but if he registers where he ought not to register, innocent persons may be misled, and may not discover, until it is too late to rectify it, the error by which, if the registration is in consequence of it to be treated as a nullity, they may be deprived of their just rights."

Following these observations, I am of the opinion that the mortgage in question must be held to be a valid mortgage. Both the donor and the donee of the power-of-attorney in question, that is to say, both Ma. Kha and Rajabali, did all that they were

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(1) 15 B.L.R. 228.



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expected to do. It was no fault of theirs if the Sub-Registrar described himself as a Magistrate and not as the Sub-Registrar. A Sub-Registrar, in describing himself as a Magistrate on a power-of-attorney must have done so inadvertently. In such circumstances I do not think that an innocent party should suffer.

For these reasons I am of the opinion that the appeal must be dismissed. The appeal is dismissed with costs.

## APPELLATE CRIMINAL.

*Before Mr. Justice Gledhill.*E MAUNG (*alias*) MAUNG GAUNG GYI

v.

THE KING.\*

1946

May 20

*Evidence Act, sections 30 and 32 (3)—Admissibility of confession Pen Code, section 34—Common intention—When drunkenness an extenuating factor.*

*Held:* The main rule is that a confession can be proved only against the person making it. The exception to this rule in section 30 is conceded because of the practical difficulty of eliminating from a consideration of the case against one accused, the confession of another accused implicating the former, but it cannot have been extended to carve another exception based on no intelligible grounds, out of the general rule, by enacting section 32 (3).

*Nga Po Yin v. King-Emperor*, U.B.R. (1904—06), Criminal, Vol. I, Evidence, 3; *Maung Tha Chaw v. King-Emperor*, B.L.T. (1907-08), Vol. I, 60, and *Mahomed Syedol Ariffin v. Yeoh Ooi Garh*, (1916) 2 A.C. 575, referred to.

*Held:* The inference of common intention within the meaning of the term in section 34 should never be reached unless it is a necessary inference from the facts proved.

*Mahbub Shah v. K.E.*, 72 I.A. 148 (1945), followed.

*Held:* Drunkenness may be an extenuating factor in a case where the accused acts on an instantaneous impulse caused by resentment which a sober man would not feel, but it cannot apply where there is no provocation whatever and the murder is the climax of a series of deliberate acts.

*Nga San Gale v. King-Emperor*, I.L.R. 12 Ran. 445, followed.

GLEDHILL, J.—The appellant E Maung *alias* E Maung Gaung Gyi has been convicted under section 302/34 of the Penal Code of the murder of Maung Kwe in furtherance of the common intention of himself, Sae Bo and Maung Pu.

Maung Pu and Sae Bo, a cousin of the appellant, were convicted by the learned Special Judge in his capacity as Special Judge sitting at

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\* Criminal Appeal No. 34 of 1946 against the order of U San Nyun Special Judge of Nyaunglebin, in Criminal Regular Trial No. 41 of 1945.

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Nyaunglebin under the British Military Administration in his trial No. 70 of 1945. Both these persons were convicted of the same offence, Sae Bo being sentenced to death and Nga Pu<sup>o</sup> to transportation for life. These sentences were confirmed by the Director of Civil Affairs, and Sae Bo was executed before the hearing of the case under appeal commenced.

The learned Special Judge has admitted, in evidence the confession of Sae Bo, holding on the authority of *Nga Po Yin v. King-Emperor* (1), that the confession was admissible under section 32 (3) of the Evidence Act. It was, however, held in *Maung Tha Chaw v. King-Emperor* (2) that the rule in section 30 of the Evidence Act, that the confession of an accused person can be taken into consideration against another accused person only when they are being tried jointly for the same offence, is not affected by the provisions of section 32 (3) of the Act.

I take the view that the confession is not admissible. It was recognized in *Nga Po Yin's* case that section 30 enacted a special exception to the general rule that an admission can be proved only against the person who made it, but it was held that Illustration (b) to section 30 could not be construed to have the effect of limiting section 32 (3).

Now Illustration (b) to section 30 is :

" A is on trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said, ' A and I murdered C '.

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried."

(1) U.B.R. (1904-06) Criminal, Vol. I, Evidence, 3.

(2) B.L.T. (1907-08), Vol. I, 60.



It was held in *Mahamed Syedol Ariffin v. Yeoh Ooi Gark* (1) that it is the duty of a Court to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of the text. It would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make such an assumption.

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There are several officially reported cases, which need not be quoted here, in which the principle set out in Illustration (b) to section 30 has been accepted as a rule of law. The point of difference between them and the present case is that the confessor in those cases was alive and in this case he is dead. In my opinion, the question whether the confessor is alive or dead cannot affect the principle involved. The main rule is that a confession can be proved only against the person making it. The exception to this rule in section 30 is, I imagine, conceded because of the practical difficulty of eliminating from a consideration of the case against one accused, the confession of another accused implicating the former, but it cannot have been extended to carve another exception, based on no intelligible grounds, out of the general rule, by enacting section 32 (3).

Section 32 (3) goes beyond the English rule, which only admits a statement against the pecuniary or proprietary interest of the person making it. It would seem probable that the legislature placed in this category statements which, if true, would have exposed the matter to a criminal prosecution, because certain acts which would only be the bases

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(1) (1916) 2 A.C. 575 (at page 581).

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of civil actions in England were crimes in India and because of the tendency in India to resort to the Criminal Courts whenever possible.

If the construction I have placed on the sections under discussion were to have the effect of making section 32 (3) superfluous, it would not be sound. However, it is not difficult to conceive of statements of deceased persons which would have exposed them to criminal proceedings which are nevertheless not confessions implicating an accused, but would nevertheless be relevant at his trial. Such statements would be admissible under section 32 (3).

Putting aside the confession, there is the evidence of Daw Chaw (P.W. 1) that she and her husband, the deceased Maung Kwe, left Obozu village in a cart at 3 p.m. to cut bamboos. Kin Maung's (P.W. 3) cart was in front and Maung Kala's (P.W. 2) was behind.

They had passed through Payagyigon village when a man with a bamboo tube asked for a lift, which was granted. A furlong further on this man told them to stop the cart, jumped down and joined two others who called to them to stop. One of them barred the way, and another shouted to the deceased "drop the *dah*".

The deceased begged them to spare them and take the cart and bullocks, but the three men shouted "No! We want your lives," and proceeded to cut Daw Chaw and the deceased. The former sustained three *dah*-cuts and the latter's head was practically severed. One of the bullocks was also cut. Daw Chaw was unable to identify the appellant.

Maung Kala and Kin Maung (P.Ws. 2-3) corroborate Daw Chaw's story up to the point when the miscreants told them to drop their *dahs*.

Maung Kin Maung immediately escaped and was unable to recognize any of them.

Maung Kala (P.W. 2) says he had known the appellant for four or five years and that he noticed three men, including the appellant, who was armed with a *dah*, follow them out of Payagyigon. One of these got on Daw Chaw's cart and a little later the other two overtook them, and the man on the cart got down. They all shouted, "Stop". One man barred the way and the appellant brandishing his *dah* came towards them. At that stage, he took refuge in flight, but he denounced the appellant to the headman next morning.

Ma Than Kin (P.W. 4), a resident of Payagyigon, saw the carts pass through the village, and a little later the appellant, Sae Bo and another man went in the same direction.

According to San Hla (P.W. 7), the headman searched in vain for the appellant on the day after the crime, and he was not arrested until two months after the crime in a village twenty-eight miles north of Payagyigon by Sub-Inspector of Police Maung Sein (P.W. 8).

The appellant's story, set out in his examination in the trial Court and in his petition of appeal, is that he took no part in the attack on the deceased and his wife, but merely attempted to prevent Sae Bo, who was drunk, getting into mischief.

His main witness to establish this case is Maung Pu, one of the convicted accused in the earlier case, who was examined on commission, and he alleged that Sae Bo was the only aggressive member of the party, while the appellant vainly begged Sae Bo to desist.

Nyun Maung (D.W. 3), an under-trial prisoner from the Nyaunglebin Lock-up, corroborated Maung Pu

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and the other two witnesses for the defence say that Sae Bo was drunk at about 2-30 p.m. on the day of the crime.

The Court summoned the headman U Aung Myint, who had examined Maung Pu on the day after the incident. On that occasion, while disclaiming all personal responsibility, he alleged that the crime was committed by Sae Bo and the appellant.

It seems very doubtful whether the crime would have been committed by a drunkard accompanied by two companions, one at least neutral and the other bent on keeping him out of mischief. The fact that the appellant absconded leaving Maung Pu and Sae Bo to their fate is inconsistent with the defence, and the learned Special Judge was right in believing the prosecution witnesses. This is merely another instance of the common practise of endeavouring to thrust responsibility upon the person who cannot answer.

With regard to the charge, I would say that the scope of section 34 of the Penal Code has been the subject of judicial interpretation in the recent case of *Mahbub Shah v. K.E. (1)*, and I quote from the headnote :

" The essence of the joint liability under the above section is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. It must be shown that the criminal act was done by one of the accused persons in the furtherance of the common intention of all. ' Common intention ' within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. The inference of common intention within the meaning of the term in section 34

should never be reached unless it is a *necessary* inference deducible from the circumstances of the case. Same or similar intention must not be confused with common intention."

In this case I see no difficulty in holding that a common intention to kill Maung Kwe was a necessary inference from the facts proved.

In assessing sentence, the learned Special Judge has taken two factors into consideration. One is that it is not proved that the appellant struck the fatal blow and the other that the appellant was drunk. Regarding the first I would point out that the appellant was, according to the prosecution witness Maung Kala, the only person armed with a *dah* when the cart was stopped. Regarding the second factor, I think the learned Special Judge was clearly wrong. As was explained in *Nga San Gale v. King-Emperor* (1), drunkenness may be an extenuating factor in, for example, a case where the accused acts on an instantaneous impulse caused by resentment which a sober man would not feel, but it cannot apply where, as in this case, there is no provocation whatever and the murder is the climax of a series of deliberate acts.

However, Maung Pu has been sentenced to transportation, and Sae Bo executed, and I am not, in the circumstances, prepared to call upon the appellant to show cause against enhancement.

The appeal is summarily dismissed.

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(1) I.L.R. 12 Ran. 445.

## CRIMINAL REVISION.

*Before Mr. Justice Thein Maung.*1946  
May 20.

MAUNG THA SEIN

v.

THE KING (MAUNG BAR KYI AND U EI KYIN):\*

*Code of Criminal Procedure, s. 247—Commencement of proceedings—Order of acquittal before appearance of accused.*

*Held* : Proceedings are said to commence against an accused as soon as a Magistrate takes cognizance of an offence and an order for summons is issued; it is not necessary that summons should be served or that the accused should be present in Court before an order of acquittal is passed in his favour on account of the absence of the complainant.

*Shanker Dattatraya Vaze v. Dattatraya Sadashiv Tendulkar*, I.L.R. 53 Bom. 693, followed.

*Suram Shiramulu v. Thotapalli Viraragadu*, 33 Cr.L.J. 579, referred to.

*Held* : If one accused who was present is acquitted the other accused although he was not present in Court and the summons on him had not been returned yet also must be acquitted.

Magistrate can acquit accused persons under section 247 even if none of them was present when the case was called.

*Panchu Singh v. Umor Mahomed Sheikh*, 4 C.W.N. 346, referred to.

*U Kyaw* (1) for the applicant.

THEIN MAUNG, J.—This is an application to revise an order of the learned Third Additional Magistrate, Rangoon, who acquitted both the respondents under section 247 of the Code of Criminal Procedure.

The applicant filed a complaint against the two respondents, and the learned Magistrate took cognizance of the case against them under section 280 of the Penal Code. Summonses were issued for the appearance of both the accused (respondents), but

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\* Criminal Revision No. 9B of 1946 against the order of acquittal passed in favour of the respondents, who were prosecuted for an offence under section 280, Penal Code, by the Third Additional Magistrate, Rangoon, in his Criminal Regular Trial No. 285 of 1945.



only the first accused was present when the case was called on the 17th December, 1945. The complainant was absent and his lawyer stated that he had left for Mergui on business. Fresh summonses were then directed to be issued for the appearance of the second accused. When the case was called again on the 31st December, 1945, the first accused alone was present. Summonses for the appearance of the second accused had not yet been returned and the complainant was again absent. His lawyer asked for further time but the learned Magistrate refused the application, dismissed the complaint and acquitted both the accused under section 247 of the Code of Criminal Procedure.

Under these circumstances, the learned counsel for the applicant has urged that the learned Magistrate erred in acquitting both the accused instead of merely passing an order either to issue fresh summons for the appearance of the second accused, or to wait for the return of the summons already issued for that purpose. However, it will be seen that the complainant had absented himself on two different occasions. Besides, under section 247 of the Code of Criminal Procedure, proceedings are said to commence against an accused as soon as a Magistrate takes cognizance of an offence and an order for summons is issued; it is not necessary that summons should be served or that the accused should be present in Court before an order of acquittal is passed in his favour on account of the absence of the complainant. As has been rightly pointed out by Mr. Justice Baker in *Shanker Dattatraya Vaze v. Dattatraya Sadashiv Tendulkar* (1) at page 698, it is to be noticed that section 247 does not say "upon the day on which

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(1) I.L.R. 53 Bom. 693.

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the accused appears" but only "the day appointed for the appearance of the accused", and if it had been intended that the appearance of the accused to answer the charge was necessary, there is no reason why the legislature should not have said so. [Compare *Suram Shiramulu v. Thotapalli Viraragadu* (1).]

The learned Magistrate could have acquitted both the accused under section 247 even if neither of them was present when the case was called. However, in this case, the first accused was present and he was entitled to an acquittal; and if the first accused is acquitted, the second accused also must be acquitted although he was not present in Court and the summons on him had not been returned yet. See *Panchu Singh alias Panchanan Singh v. Umor Mahomed Sheikh* (2).

So, there is no ground whatsoever for interference in revision with the orders of acquittal passed by the learned Magistrate.

The application is dismissed.

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(1) 33 Cr. L.J., p. 579.

(2) 4 C.W.N., p. 346.

## APPELLATE CRIMINAL.

*Before Mr. Justice Thein Maung.*DAW KYAI NYUNT *v.* THE KING.\*

1946

May 30.

*Interpretation of Statute—Courts (Emergency Provisions) Act, 1943, s. 14 (b)—Code of Criminal Procedure (Amendment) Act, 1945, s. 121—Rule 115A of the Defence of Burma Rules.*

*Held* : The special enactment for the emergency must overrule any general enactment and the latter can have full play only after the special enactment has expired.

Repeal by implication is not favoured and any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention.

Where general words in a later Act are capable of reasonable and sensible application without extending to subjects specially dealt with by earlier legislation that earlier and special legislation is not to be held indirectly repealed, altered or derogated from merely by force of such general words without any indication of a particular intention to do so.

† *Held* : Trial of a person under Rule 115A of the Defence of Burma Rules by a First Class Magistrate is void *ab initio*.

*Ba Sein* for the applicant.

*Chan Tun Aung* (Government Advocate) for the respondent.

THEIN MAUNG, J.—The memorandum of appeal in this case has in the course of hearing been treated as an application for revision at the request of U Ba Sein and with the consent of the learned Government Advocate.

The applicant filed the memorandum of appeal against her conviction and sentence of four months' rigorous imprisonment under Rule 115A of the Defence of Burma Rules by the Third Additional Magistrate, Rangoon. The learned counsel for the applicant

\* Criminal Revision No. 25B of 1946, Criminal Appeal No. 24 of 1946 against the order of U Aung Cheint, Third Additional Magistrate, Rangoon, in Criminal Regular Trial No. 119 of 1946.

† *Note by Editor* : The law on this point has been altered since.



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has urged that an appeal does lie to this Court inasmuch as section 14 (b) of the Courts (Emergency Provisions) Act, 1943, must be deemed to have been repealed by implication by section 121 of the Code of Criminal Procedure (Amendment) Act, 1945. His case is that section 413 of the Criminal Procedure Code as substituted by the Amendment Act, 1945, is inconsistent with section 14 (b) of the Courts (Emergency Provisions) Act, 1943, and that being so the provisions of the later Act, *i.e.* the Amendment Act, must be deemed to have repealed and superseded the said provisions of the earlier Act by implication. In support of his contention he relies also on the proviso to sub-section (2) of section 6 of the Special Judges Act, 1946. According to him, the reference in the said proviso to section 413 of the Code would be meaningless if section 14 (b) of the Courts (Emergency Provisions) Act, 1943, must still be given effect to.

However the learned counsel for the applicant appears to have overlooked the fact that the Courts (Emergency Provisions) Act, 1943, is a special enactment "to modify or suspend certain rules of procedure of the Civil and Criminal Courts and to make provision for the conduct of judicial business during the present emergency", whereas the Code of Criminal Procedure (Amendment) Act, 1945, is a general enactment to amend the Code permanently.

Section 14 (b) of the former Act does not purport to amend section 413 of the Code of Criminal Procedure. It really provides that the said section shall have effect as if it read in a certain manner. So long as section 14 (b) of the said Act is in force, *i.e.* so long as the emergency continues, section 413 of the Code is to have the same effect regardless of any amendment or amendments that may be

made in its wording by any general Amendment Act. In other words, the special enactment for the emergency must override any general enactment and the latter can have full play only after the special enactment has expired.

As has been pointed out at page 147 of Maxwell on the Interpretation of Statutes, repeal by implication is not favoured and any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention.

Besides *generalia specialibus non derogant* is a well-known maxim of interpretation. Where general words in a later Act are capable of reasonable and sensible application without extending to subjects specially dealt with by earlier legislation that earlier and special legislation is not to be held indirectly repealed, altered or derogated from merely by force of such general words without any indication of a particular intention to do so (*see* Maxwell, page 1256).

There is nothing in the proviso to sub-section (2) of section 6 of the Special Judges Act, 1946, which militates against the view that section 14 (b) of the Courts (Emergency Provisions) Act, 1943, still remains in force in spite of the amendment of section 413 of the Code by the Code of Criminal Procedure (Amendment) Act, 1945, on the ground that the objects of the two enactments were not the same. The reference in the said proviso is to section 413 of the Code as amended by the Amendment Act and effect can be given to the said proviso in spite of section 14 (b) of the Courts (Emergency Provisions) Act, 1943.

I accordingly hold that the appeal does not lie. However, as I have stated above, I am treating the memorandum of appeal as an application for revision.

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I am doing so as I find that the trial of the applicant was void *ab initio* inasmuch as the case against her is under Rule 115A of the Defence of Burma Rules, which is punishable with imprisonment for a term which may extend to seven years, and the learned Third Additional Magistrate, Rangoon, is only a First Class Magistrate [see Second Schedule to the Code of Criminal Procedure and section 530 (p) of the Code].

The trial is void as the learned Magistrate did not have the necessary power to try the applicant; and the interests of justice require that she should be tried again.

I accordingly set aside her conviction and sentence and order that she be re-tried according to law by such competent Magistrate or Special Judge as the District Magistrate, Rangoon, may direct.



## PRIVY COUNCIL.

A.L.N. NARAYANAN CHETTYAR

v.

OFFICIAL ASSIGNEE OF THE HIGH COURT  
OF JUDICATURE AT RANGOON.†J.C.  
1941

May 27.

*Fraud—Proof of—Suspicion and conjecture not sufficient—Must be proved beyond reasonable doubt—Witness examined on commission at early stage—Application for further cross-examination on entries in books refused—Weight of such evidence.*

*Held* : Fraud, like any other charge of a criminal offence, whether made in civil or criminal proceedings, must be established beyond reasonable doubt. A finding of fraud cannot be based on suspicion and conjecture.

Where a witness had given evidence on commission at an early stage of a case and his evidence is the first indication of the actual case of a party and the party affected applied for his further cross-examination with reference to entries in books which was refused, his evidence is obviously of less weight than if it had been fully tested.

May 27. The judgment of the Board was delivered by

LORD ATKIN : This is an appeal from the High Court of Judicature at Rangoon in a suit in which the plaintiffs claimed to set aside, on the ground of fraud, a sale of land to the defendant Kasi, now an insolvent, whose estate is represented by the Official Assignee. The District Judge of Bassein made an order in favour of the plaintiffs : but his decision was reversed by the High Court, who found that the fraud was not established and dismissed the suit. The evidence is voluminous and consists in large part of entries in account books. Their lordships have fully examined it with the

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\* Privy Council Appeal No. 32 of 1940

† Present : LORD ATKIN, LORD RUSSEL OF KILLOWEN, LORD ROMER and  
IR GEORGE RANKIN.

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assistance of the learned counsel for the appellants, but finding themselves in substantial accord with the views of the facts expressed in the judgments in the High Court and with their reasons for differing from the trial Judge, do not find it necessary to discuss the facts again at length. The substance of the case is that the plaintiffs are nominal owners of seven-eighths share in A.L.A.R.N. Chettiar Firm (who will be styled the plaintiffs' firm) carrying on a money-lending business in Kyaunggôn, Lower Burma. The true owner of the share was one Nagappa : the remaining one-eighth share was held by the second defendant, Subbaya, who was a salaried partner under an agreement with Nagappa by which Subbaya was to act as managing partner. The plaintiffs' firm was possessed as part of its assets of 1,314 acres of paddy land and a house in and about Kyaunggôn, and in January, 1931, Subbaya, as managing partner, agreed to sell this property to the defendant Kasi for 70,000 rupees. The transaction was carried out by a registered deed of sale dated January 5, 1931, and on completion Kasi paid the purchase price by a cheque on the National Bank of India, which was duly paid : subsequently, though there was some controversy about this, he took possession. The cheque was drawn by a local banking firm R.M.P.M. which carried on an extensive business in Rangoon. Kasi had at one time been the "agent" of this firm : but had been succeeded in this post by one Somasundaram. Kasi to raise the Rs. 70,000 had borrowed the amount in different sums from five Chettiar firms who thereupon had made this sum available for him in the R.M.P.M. Bank. The bank drew a cheque for the amount on the National Bank of India in favour of Kasi, who endorsed it to

the plaintiffs' firm, and all the parties attended at the office of the National Bank where the cheque was paid. It is not now disputed that the sale was for a fair value, and that Subbaya had authority as partner to sell. Both these issues were originally raised by the plaintiffs, but were determined against them by the trial Judge. The transaction so far appears a normal and regular transaction. But the plaintiffs allege that the apparent sale was fictitious and entered into under a conspiracy between Kasi and Subbaya to defraud the plaintiffs' firm. It is alleged that the consideration money was returned to Kasi by Subbaya the same day, with the result that the firm lost their property without the benefit of the price, while Kasi enjoyed the property and the price.

One of the difficulties in the case has been to appreciate the nature of this conspiracy. It is plain from the plaintiffs' case that Kasi borrowed the Rs. 70,000 and made himself personally liable for the amount, and that he did not use the returned money to pay off the lenders; and there is no evidence that he applied any part of it for the benefit of Subbaya. And it would appear strange that Subbaya should hand over property of the firm in which he had one-eighth interest to Kasi for nothing. The suggestion made was that the scheme enabled Subbaya to enter the price as a credit to the firm, and then by book-keeping entries wipe out a debt due to the plaintiffs' firm from the Letpadan firm of which he and his elder brother were partners, debiting himself with the whole price. This is in fact what he did, but it hardly seems to require the assistance of Kasi: especially as in two other cases Subbaya seems to have dealt similarly with sums received from the firm, for one

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of which cases he was eventually sentenced to imprisonment. However, whatever the motive, it is said that Kasi undoubtedly did receive the money back, for the next day it is alleged that he took Rs. 70,000 to the R.M.P.M. Bank, and received from the bank four cheques, one on the Central Bank, one on the Allahabad Bank and two on the National City Bank for Rs. 66,000. If in fact Kasi was in possession of Rs. 70,000 the next day there can be no doubt, whatever the motive of the fraud, that the plaintiffs' case is proved. Subbaya gave evidence that he returned the money to Kasi, but as Subbaya was in any view an accomplice, had himself been convicted of fraud on the plaintiffs' firm, and had by the terms of a compromise in the partnership suit brought by Nagappa a substantial interest in the success of the plaintiffs' claim his evidence of itself is not of much value. Everything, therefore, seemed to turn on proof that these cheques were issued for cash to Kasi on January 6. The kind of business represented by these cheque transactions is said not to be unusual in this kind of bank. The bank being ready to receive cash, takes an amount offered and gives to the temporary customer a cheque drawn on one of the recognized banks. There is an understanding that the cheque is not to be presented till a definite date: on which date it will either be presented to the bank on which it is drawn or returned to the Chettiar bank which issued it in exchange for cash. The cheque is drawn in the name of the customer: there is a diary kept recording the cheque and the due date: but according to the evidence there is no other entry kept in the bank's books other than a debit in the day book of a cheque on the named bank. What happens to the cash account which

has temporarily been increased by the sum paid for the cheque was not explained. It was in respect of business of this nature that Kasi is said to have come to the bank on January 6, and paying over Rs. 70,000 to have received cheques for Rs. 66,000, and to have created a credit for the balance in favour of Ganesh & Co., a firm with which he was intimately associated. Kasi denies that he received the money from Subbaya on the 5th, that he went to the bank on the 6th, or received any cheques. There is no doubt that cheques for Rs. 66,000 drawn on the banks mentioned above are entered in the books of the R.M.P.M. Bank on January 6, but there is nothing in the books to identify them with Kasi. Neither the cheques nor the counterfoils, nor the diary were produced in evidence. There was evidence of two witnesses that cheques were given to Kasi on that day to which reference will be made later. But the plaintiffs' case did not rest alone on the entries of the cheques on the day on which they were issued. They were returned unpaid at different dates within about a month: and on those dates it is said that there are entries showing that the cash which on their return would be available to Kasi was used in creating credits at his request in favour of firms in which he was interested: and in one case in creating a temporary loan of Rs. 7,500 by him to the bank not on this occasion by means of a cheque. There is no separate account opened in respect of each cheque: no credit therefore is set against the amount of the cheque: none of the entries are in terms associated with Kasi, except the loan account of Rs. 7,500: and in respect of the original entry of that amount in the daybook there is an unfortunate blot which might serve to conceal

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the full initials of the name referred to. In the ledger the entry appears in Kasi's full names. Kasi denies that he ever made such a loan: and as to the other amounts gives explanations which were not disproved, indicating that they had nothing to do with the Rs. 70,000. A substantial balance of the cheques remains with no indication at all as to what happened to it. As to the parol evidence. Somasundaram who was "agent" of the bank, and appears to be an independent and respectable witness gave evidence that Kasi came to the bank on the 6th with money and wanted cheques. He referred him to the clerks whose duty it was to deal with the matter. He does not know how much money he brought, or what cheques he got. Another clerk, Subramanian, was more definite. According to him, Kasi conducted the actual transaction with him: brought him Rs. 70,000 which was laid on his desk: and received the cheques. He said he could not state the contents of the cheques without seeing them. It appeared, however, from other evidence that Subramanian, who was only a junior clerk, was not entrusted with the duty of handling cash: and it was said that he had been discharged from a former employment for dishonesty. The trial Judge placed no reliance on his evidence. For the defendants evidence was given by another clerk of the banking firm, Paraparam, also apparently and independent witness of integrity. He was senior to Subramanian and with three other clerks was in charge of cash. He had supervised the transaction on January 5, when Kasi was given the cheque for Rs. 70,000. He says that Kasi did not bring any money to the bank on January 6: and that the bank did not issue any cheques to Kasi on that day or subsequently. There is thus a complete



conflict between two responsible clerks in the Chettiar bank on this vital question of the cheques. But as regard Somasundaram the defendants have a legitimate criticism to make, *viz.* that he had given his evidence at an early stage in the case and his evidence was the first indication that the defendants had that the plaintiffs' case was that the purchase price had been paid and then returned. Their Lordships are not prepared to decide this case at this stage on the footing that such a case was not open on the pleadings. But when the evidence was returned the defendants not unnaturally applied for further opportunity of cross-examining Somasundaram in the light of the books. Unfortunately this was refused and the refusal was upheld by the High Court on revision. His evidence on this point is obviously of less weight than if it had been fully tested. In the result as it appears to their Lordships the whole case depended upon the contents of the cheques. If drawn in favour of Kasi he must fail: if drawn in favour of strangers unconnected with Kasi the plaintiffs fail. But neither cheques nor counterfoils were produced. Nor is there satisfactory evidence that they had been lost or destroyed. Their Lordships would be reluctant to decide the case on any technical objection that the evidence as to the cheques was inadmissible in their absence. But on the evidence as it stood there was so little reliable evidence to connect Kasi with the alleged dealings with the bank on and after January 6 that the case of fraud must fail. There are other difficulties in the plaintiffs' way which have been sufficiently considered in the judgments of the High Court. Fraud of this nature, like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond

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reasonable doubt. The High Court were justified in holding that the trial Judge's finding was largely based on suspicion and conjecture. There were documents unaccounted for which would conclusively prove the issue one way or the other. In their absence the High Court's decision on the merits was right and cannot be disturbed. Their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal.

## APPELLATE CIVIL.

*Before Sir Ernest H. Goddman Roberts, Kt., Chief Justice,  
and Mr. Justice Dunkley.*

S.R.M.M.C.T.M. CHETTYAR FIRM

v.

THE COLLECTOR, MAUBIN.\*

1941

Dec. 4.

*Land Acquisition Act, ss. 23 (1), 26, Part III—Proceedings before District Court—Separate enquiry and award—Dismissal of application illegal—Judgment of Court based on evidence—Material before Collector irrelevant.*

\* The proceedings before the District Court under Part III of the Land Acquisition Act are intended to constitute a separate enquiry and must terminate with a specific award by the Court; and a mere dismissal of the application, which is an application to the Collector to make a reference, is not contemplated by the Act. The proceedings before the Court are judicial proceedings and the decision therein must be based on evidence before the Court or admissions made by the parties, and not on the material before the Collector. The judgment must refer to all the matters mentioned in s. 23 (1) of the Act in connection with which complaint is made by the applicant.

*C.R.M.A. Firm v. Special Collector of Pegu*, I.L.R. 8 Ran. 364; *MacIntyre v. Secretary of State for India*, 2 L.B.R. 208; *Shwe Gaung v. The Collector*, 4 L.B.R. 71, referred to.

*Hay for the appellant.*

*E Maung* (Government Advocate) for the Collector.

DUNKLEY, J.—This appeal arises out of a proceeding under Part III of the Land Acquisition Act before the District Court of Maubin, and learned counsel for both parties agree that the appeal must be allowed and that the case must be referred back to the District Court for rehearing. The learned District Judge has undoubtedly misconceived the

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\* Civil 1st Appeal No. 65 of 1941 from the order of the District Court of Maubin in Civil Misc. No. 5 of 1940.



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scope of an enquiry under Part III of the Land Acquisition Act and apparently he was not referred to the reported decisions of this Court and of the Chief Court of Lower Burma on this point. In *C.R.M.A. Firm v. Special Collector of Pegu* (1) the decision of the Chief Court of Lower Burma in *S. T. MacIntyre v. The Secretary of State for India* (2) was approved, and in that case it was held that the proceedings before the District Court are intended to constitute a separate enquiry and must terminate with a specific award, and a mere dismissal of the application is not contemplated by the Act. In the same decision of a Bench of this Court reference was also made to the case of *Shwe Gaung v. The Collector* (3), in which it was held that the proceedings before the District Court are judicial proceedings and the decision therein must be based on evidence before the Court or admissions made by the parties. The learned District Judge has based his decision mainly on material which was before the Collector, although the Collector's proceedings were irrelevant so far as he was concerned, and he was bound to come to his independent decision on the materials which were placed before him, so far as they were relevant or admissible under the provisions of the Evidence Act. The materials which were made use of by the Collector, unless the various sales and so on were duly proved in the proceedings before the District Court, were irrelevant and inadmissible in this proceeding under Part III of the Act.

Moreover, the learned District Judge has made a fundamental mistake in dismissing the application, for as was pointed out in *MacIntyre's* case (2), an

(1) I.L.R. 8 Ran. 364.

(2) 2 L.B.R. 208.

(3) 4 L.B.R. 71.

application under section 18 of the Act is not an application to the District Court, but an application to the Collector to make a reference, and a reference made by the Collector cannot end in the dismissal of an application because there is no application before the District Court, but must end in a specific award. This is quite clear from the provisions of section 26 of the Land Acquisition Act.

In making his award the learned District Judge must refer specifically, if he is required by the applicant to do so, to each of the matters mentioned in section 23 (1) of the Act and must come to a decision in regard to each of these matters. It is not sufficient for him to say that because the Collector has allowed a somewhat generous figure as the value of the land it is therefore unnecessary for the Court to come to any conclusion as to whether an award in respect of damage for severance or in respect of the trees and crops standing on the land ought to be allowed.

In regard to this question of severance the learned District Judge has stated, as a further reason for not granting any award in respect of severance, that the severance of a part of the land and its becoming flooded by being between two bunds is not a matter which could entitle the applicants to compensation, and he has quoted an opinion of his predecessor made in Civil Miscellaneous Case No. 3 of 1933 of the District Court. This opinion is to the effect that where a person erects a bund on his land in such a manner as to cause the ordinary flow of water to be stopped and thereby flooding is caused on the land of his neighbour, his neighbour has no cause of action in respect of that flooding against him. We must dissent from such opinion, for quite clearly there would be a cause of action

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for an injunction and damages, and there are numerous reported cases of this Court in which damages have been allowed in cases of this kind.

It is clear that the proceedings of the District Court in this case have been conducted under a misconception of the scope of the enquiry under Part III of the Act and, as I have said, both learned counsel are agreed that this appeal must be allowed and that the proceedings must be referred back for rehearing. Accordingly, the appeal is allowed and the judgment of the District Court dated the 10th April, 1941, is set aside, and the proceedings are referred back to the District Court for rehearing, with the direction that the evidence which has already been recorded shall be taken into consideration at the rehearing and that either party shall be permitted to call such further evidence as he may desire to call, and that after the evidence has been heard the learned District Judge shall, in accordance with the provisions of the Act, write a judgment ending in a specific award in which account must be taken of all the matters mentioned in section 23 (1) of the Act in connection with which complaint is made by the applicant. Costs of this appeal will be costs in the rehearing of the matter, advocate's fee five gold mohurs.

ROBERTS, C.J.—I agree.



## CIVIL REVISION.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice,  
and Mr. Justice Dunkley.

MA' HLA YI v. MA THAN SEIN AND OTHERS.\*

1941  
Dec. 10.

*Abatement of suit—Death of party after conclusion of suit and before judgment—Conclusion of arguments—Judge desirous of obtaining book or judgment for consultation—Code of Civil Procedure, O. 22, r. 6.*

There is no abatement of a suit by reason of the death of either party between the conclusion of the hearing of such suit and the pronouncement of the judgment. The hearing is concluded when the arguments of the advocates are completed. The mere fact that the Judge borrows a book from an advocate for consultation or awaits a copy of a judgment relied upon and promised by an advocate before he pronounces judgment does not prevent the case from being concluded when the arguments were completed.

*A.T.K.P.L.M. Chettyar v. Tha Zan Hla, I.L.R. 11 Ran. 446, referred to.*

*J. B. Sanyal* for the applicant.

*Kyaw Din* for the respondents.

ROBERTS, C.J.—This is an application in revision by one Ma Hla Yi, who is dissatisfied with an order of the learned District Judge of Pyapôn ordering that the respondents should be brought on the record of a suit as legal representatives of U Ba Thein and Daw Saw May.

I cannot, personally, as at present advised, see how this application in revision could be brought at all, since under section 115 of the Civil Procedure Code we can only interfere in revision where a subordinate Court appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction vested in it, or, thirdly, to have acted in the exercise of its

\* Civil Revision No. 155 of 1941 from the order of the District Court of Pyapôn in Civil Regular No. 1 of 1939.

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jurisdiction illegally, and with material irregularity; and I am far from satisfied that any of those conditions have been fulfilled in this case.

However, we both think it desirable that something should be said about the subject-matter. Ma Hla Yi began this case as the defendant and after hearing her first three witnesses it was agreed both by the defendant's advocate and by the plaintiff's advocate that no further evidence was necessary and that the matters in issue depended upon a determination of a legal argument. We then take from the learned Judge's diary and from his judgment the plain statement that the hearing of argument was finished on the 5th September 1939; and that being so, it is plain that Order XXII, Rule 6, applies to the case. That Order, shorn of irrelevant words, says that there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment. Daw Saw May in fact died on the 7th September, and the learned Judge says that the arguments were completed on the 5th September, and therefore there can be no abatement between the completion of the hearing and the pronouncement of the judgment; the judgment would have the same force as if the death had not taken place.

That being so, we next turn to the case of *A.T.K.P.L.M. Muthiah Chettyar v. Tha Zan Hla and others* (1), and that is authority for the proposition that once a preliminary decree has been passed and no application has been made within 90 days from the date of death of a defendant who has died after the passing of the preliminary decree

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(1) I.L.R. 11 Ran. 446.

to bring his legal representatives on the record, the suit does not abate as against the deceased defendant, and that disposes of the second contention and shows that the legal representatives can be added at any time. Great effort has been made to get us to go behind what the learned Judge has said in his diary and to show that he has made an erroneous statement of fact in saying that the arguments before him were concluded on the 5th September, the fact being, as appears from a consideration of details into which the learned District Judge has taken the trouble to go, that on the 5th September the position was that the learned Judge, before giving judgment, desired to read for himself a Privy Council ruling which was recent and which had not yet been officially printed; accordingly, the plaintiff's advocate undertook to file a copy of the judgment in question, which, of course, he was not bound to do having called attention to the case, and the learned Judge was in the position of one who was ready to borrow a book which had been kindly offered to him. There was no question of arguments not having been completed, any more than there would be if I were to borrow a book, which I wished to consult in the privacy of my house before delivering judgment from one of the advocates who has appeared before me.

Consequently, although I think it is in this case impossible to question the statement of facts made by the learned Judge in his diary, we have troubled here to go beyond that and we have seen that any attempt to attack their accuracy must go by the board. There are, therefore, no grounds on which this application in revision can be entertained, even if it was one which could be competently brought,

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1941 and, accordingly, the application must be dismissed  
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DUNKLEY, J.—I agree.

ROBERTS,  
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I am of the same opinion as my Lord that this application was never competent under the provisions of section 115 of the Code of Civil Procedure. But, apart from that, I desire to say that for myself I should have been extremely reluctant to exercise a discretionary power of the Court—and the power under section 115 is discretionary—in favour of an applicant who, in order to avoid the just payment of her debts, has attempted to make use of such a technical objection as that which has been raised in this application.

## APPELLATE CRIMINAL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice,  
and Mr. Justice Dunkley.

THA NGE GYI AND NGA MYA

v.

THE KING.\*

1941

Dec. 22.

S 302, Penal Code, Murder—While effecting safe retreat—"In course of dacoity"—"Approver"—Principal witness—Order of Examination—Pardon to approver—When to be tendered—Confession—Of evidence—Confession of co-accused—S. 157, Evidence Act—Statement to Police not admissible as Prosecution evidence—Criminal Courts—Should apply Penal Code rulings where applicable—Cross-examination—Limits of—If confined to advocate's instructions or personal knowledge.

*Held*: Where murder is committed in the course of effecting a safe retreat, it is committed "in the course of" the dacoity, as the safe retreat was an essential part of the common criminal purpose of the dacoits.

*Q.E. v. Sakhāram Khander*, 2 Bom. L.R. 325; *Vittu Thevan's Case*, 5 Cr. L.J. 201; *Monoranjan Bhattachariya v. Emperor*, 33 Cr. L.J. 722, approved and followed.

Where an approver is examined as the principal witness at a trial, it is desirable that his evidence should be given at the earliest possible opportunity. If proof of guilt of all accused can be proved without the help of the approver's evidence, it would be altogether wrong to pardon a guilty person on condition.

*Nga Myo v. The King*, [1938] Ran. 190, followed.

A confession is not evidence of the truth of the matters stated therein. Evidence of an approver at the Sessions trial is not confession, but evidence on oath. The confession of a co-accused is not strictly evidence, but it is a statement which may be taken into consideration under section 30, Evidence Act.

"Statement to the Police made in the course of their investigation should not be put in to help the prosecution as if they were admissible (which they are not) under s. 157, Evidence Act. A document which the accused or his advocate has a right to inspect does not become evidence from the mere fact of inspection.

Care should be taken in all criminal cases to apply, where necessary, the rulings of the Privy Council. Persons in custody may point out objects to a magistrate or searcher, but the statements which accompany the discovery of such objects are not admissible in evidence.

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\* Criminal Appeals Nos. 1165 and 1166 of 1941 against the order of the Additional Sessions Judge, Bassein, dated the 13th November 1941, passed in Sessions Trial No. 23 of 1941.

1941	<i>Pakala Narayan Swami v. K.E.</i> , 18 Pat. 234 ; <i>Ramdayal Mangilal v. The King</i> , [1941] Ran. 789, followed. .
THA NGE GYI AND NGA MYA v. THE KING.	In cross-examination, an advocate can put questions remote from his instructions or from personal knowledge. Scope and limit of cross-examination explained.

*Dr. Rauf* for the appellants.

*Lambert* (Government Advocate) for the respondent.

ROBERTS, C.J.—The appellants were each convicted of the murder of Ma Saw Mya on April 16th, 1941, and were sentenced to death : they were also convicted of the offence of dacoity contrary to section 395 of the Penal Code and were each sentenced to six years' rigorous imprisonment.

We have already ordered that their convictions for murder contrary to section 302 of the Penal Code must be set aside and have refused to confirm the sentences of death passed upon either of them. It is necessary to set out our reasons at greater length, and also to make some observations on their trial which took place before the learned Additional Sessions Judge at Bassein. As we have ordered, the convictions under section 395 of the Penal Code will each be affirmed and we see no reason to interfere with the sentences passed on either of the appellants in respect of this offence.

On the 16th of April there was a dacoity at the house of Maung Saw Ba at Yele. Maung Saw Ba himself was away from home at the time. The dacoits were seven in number and six of them entered the house at between seven-thirty and eight in the evening after it was dark. They tied up Saya Gale, who was Saw Ba's brother-in-law and lived with him, and Kyaw Din, a middle-aged cooly,



and ordered Ohn Nyun, Saw Ba's son, to crouch down and keep quiet. These three persons had been assisting in the work of stringing tobacco leaves, Ohn Nyun being engaged in pointing bamboo sticks with a *dah*. At the front of the house were three coolies and four women, including the deceased Ma Saw Mya, who was the sister of Saw Ba and wife of Saya Gale. After asking where Saw Ba was, the dacoits presently seized Ma Saw Mya and were heard to demand Rs. 500 from her. She said she had not got it and some one or more of them threatened her with death if she did not show where money or valuables were concealed. Kyaw Din managed to untie himself and escape, and ran and hid in the granary. After collecting a very small amount of booty (some Rs. 6 in cash and some *nagats* said to be worth Rs. 19 and a counterfeit rupee) the dacoits decamped taking with them as hostages the three coolies, We Gale, Mya Maung and Tin Saw, and also the deceased Ma Saw Mya. Two of the dacoits took Ma Saw Mya away out of sight and hearing of these three coolies, and later returned. The three coolies were then released and allowed to go home, and the dacoits went on their way in a different direction. The coolies shouted to Ma Saw Mya but she did not answer them. She was lying dead a short distance away. When they returned they brought villagers who discovered her body. She had been most savagely murdered, her spinal cord having been severed in two places causing wounds each of which was necessarily fatal. Two other serious wounds were each sufficient in the ordinary course of nature to cause death.

This is, in its barest outline, the story of the dacoity as told by those who were at the house of Saw Ba when the attack took place.

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In consequence of information received the police visited several houses and arrested a number of persons, including one Thén Maung. He was taken before the Township Magistrate at Yegyi and made a confession of dacoity. He was pardoned and became an approver in the subsequent trial. Another person Nga Dwe also made a confession of a similar character; he, however, was sent up for trial with the other persons arrested; and they were all very properly committed charged with offences contrary to section 396 of the Penal Code, which deals with a case in which any one of five or more persons who are conjointly committing dacoity commits murder in so committing dacoity and prescribes a more severe maximum punishment for every one of those persons.

In such circumstances the learned Additional Sessions Judge should not have altered the charge sheet. It is plain that murder was committed by one or more of these dacoits; and also that it was committed "in so committing dacoity".

In *Queen-Empress v. Sakharam Khander* (1) it was held that where murder was committed in the course of effecting a safe retreat which was an essential part of the common criminal purpose of the dacoits it was committed in the course of and was a continuation of the actual dacoity. It is possible, no doubt, to imagine instances in which murder was committed by some one or other of the dacoits after their common purpose had been effected, by reason of their separation, or of the lapse of time or of their distance from the dacoited place. But in this case the other hostages were not released, nor did the dacoits disband till after the

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(1) 2 Bom. L.R. 325.



deceased was murdered ; and a ring which the deceased used to wear was actually taken from her finger immediately before she was murdered. In *Vitti Thevan's* case (1) it was held by a Bench in Madras that when murder was committed by one of the dacoits whilst they were engaged in carrying off stolen property, and had not begun to run away, charges under section 396 lay against them. And in *Monoranjan Bhattachariya v. Emperor* (2) a Full Bench at Calcutta held that whilst the dacoits were running away and one of them turned and fatally stabbed his pursuer a charge under section 396 lay against all of them even though the booty had been abandoned. It must be mentioned that all these authorities are referred to in the notes to section 396 in Ratanlal on Crimes.

However the trial proceeded as a trial of the two present appellants for murder contrary to section 302 ; and against them and four other persons for dacoity contrary to section 395.

In view of the fact that the principal witness against them was the approver Thein Maung it was eminently desirable that his evidence should be given at the earliest convenient moment in the course of the trial. Formal evidence, such as that of the person who prepared a plan of the scene, might be taken at the outset ; but where a person has been made an approver, the principal task before the Court must be to see whether his evidence is corroborated by that of other witnesses and consequently the approver must be examined first.

The nature of the corroboration required seems to have been misconceived by the learned Judge.

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(1) 5 Cr. L.J. 201.

(2) 33 Cr. L.J. 722.



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A person is made approver only because the prosecution considers that without his evidence they could not hope to obtain a conviction. If proof of the guilt of all the accused persons were satisfactorily forthcoming without the assistance of an approver's evidence it would be altogether wrong to pardon a guilty person on condition that he supported the prosecution story; and not only would it be wrong, but it would be unnecessary to do so. On the other hand it has again and again been held that it is usually unsafe to act upon the evidence of an approver alone; in this connection I need only refer to *Nga Myo v. The King* (1) which is now the leading authority in Burma on this subject. The Court must carefully scrutinize his evidence against each of the accused and, as it is laid down in that case, should see that it is corroborated in a material particular and that it implicates the accused person himself with the commission of the crime charged.

In this case the approver was the forty-fifth witness for the prosecution: the Judge set himself an almost impossible handicap by adopting this procedure: how could he tell whether the earlier witnesses were corroborating what the approver was about to say in the witness box? Really, his only means of guessing what the approver would say was by looking at his confession Exhibit V. But this confession was not evidence of the truth of the matters therein stated, and it ought never to have been looked at for this purpose. The evidence of the approver at the Sessions trial was not his confession, but was given by Thein Maung himself, put into the witness box, examined on oath, and subjected to cross-examination. The contents of

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(1) [1938] Ran. 190.

Exhibit V only became material, or indeed admissible, under sections 145, 155 and 157 of the Evidence Act. Several times in the course of the judgment reference is made to Thein Maung's "confession": it was not his confession before the Magistrate but his evidence in the Sessions Court which required careful scrutiny.

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How far was this evidence corroborated? The Court should have considered that the two appellants were charged, first, with murder and secondly with dacoity. No attempt appears to have been made to make this distinction, and once the learned Judge satisfied himself that the approver's evidence had received certain corroboration he lost sight of the distinction altogether. On the last two pages of his judgment he says "Further question is whether the accused Tha Nge Gyi and Nga Mya Gyi can be convicted for causing the death of Ma Saw Mya on the evidence narrated above. I see no reason to disbelieve the evidence of approver Thein Maung and accused Nga Dwe". Then there is this reference to corroboration. "They are also corroborated by We Gale and Mya Maung whose evidence is that Ma Saw Mya was taken away by two men and the two men said that they had done with Ma Saw Mya."

But this is not corroborative evidence implicating the Appellants: it only tends to show that some two of the dacoits committed the murder independently of the rest; that may be true; but it by no means follows that those two were the appellants and no one but the approver says they were.

When the learned Judge refers to the "evidence" of Nga Dwe in this connection, he is, first of all, incorrectly stating its probative value. The confession



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of a co-accused is not strictly evidence, but is a statement which may be taken into consideration as against the appellants under section 30 of the Evidence Act. But, secondly, Nga Dwe says he went home at the very beginning of the dacoity; he does not pretend to know anything about the murder; and he has said nothing detrimental to the appellants in connection with the charge under section 302 of the Penal Code brought against them.

We have examined the evidence, during the argument before the Court, with the utmost care and have had great assistance from advocates on both sides. The learned Government Advocate has been obliged to admit, and has most properly admitted, that the convictions against the appellants for murder cannot be sustained. There is, in my opinion, a further circumstance which shows that not only is Thein Maung's testimony in this regard wholly uncorroborated, but that it is also quite unreliable.

He stated that the appellants Tha Nge Gyi and Mya Gyi took Ma Saw Mya away and then the former returned saying "We have done that woman. We want to do these boys" (meaning the coolies who were taken as hostages and adding) "if we cut off their heads the matter will end here". "I told him", says Thein Maung "don't kill these boys; I released the three boys and told them to run".

This is, however, palpably untrue. We Gale, one of the coolies said in evidence: "*Before* Ma Saw Mya was called away by two of the dacoits one dacoit said 'Kill all of them': one man told him 'Please do not do so'. About a betel chew after we had been kept in a crouching position the two men who called away Ma Saw Mya came back



When they got to a distance of about one fathom from us, *one of them* said 'we could go home. They also went away.'

Mya Maung said "I then heard them telling at the foot of the tree, such as 'These are the only properties we have received'. Later, one of them said, 'we must kill these three persons'. One of them asked that man not to do. After that two men called away Ma Saw Mya towards Daunggyi. Four other dacoits took us towards Tetseik. When we reached to a distance of about 100 yards (indicated), we were again made to stay in a crouching position. We had to do so. While we were staying in that position, I heard one man saying, 'Saw Ba and Ma Saw Mya are avaricious. Tell Saw Ba that our *dah* will not spare him if we meet'. About a betel chew after we had stayed in that position, I heard the foot steps of two men coming back. They did not say anything. I could not see anything with them as we had to stay in a crouching position. When the two men took Ma Saw Mya away from near the 'Kokko' tree, it was dark. When those two men came back to us, they flashed their torches. When they came back, they asked us to go home with the instruction to tell Saw Ba that their *dahs* would not spare him".

The third cooly Tin Saw was a boy of 13 (P.W. 12) and was not examined on this point.

It is thus evident that Thein Maung, as is not uncommon with approvers, has tried to make out that he took a minor part and actually released the other hostages, but the hostages do not corroborate him in this matter at all; or at least, if they can be said to do so, it can only be because he himself was one of the two persons who took Ma Saw Mya away and murdered her. It would therefore be

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most unsafe to convict of the offence of murder, the two appellants whose identification as the persons who led away Ma Saw Mya rests solely upon the evidence of the approver and is not corroborated in any material particular by any other witness. The learned Judge, having deleted the charge under section 396, was faced with a situation in which the appellants could only be convicted under section 302 for actual participation in the murder themselves. But when we turn to the question of their guilt as dacoits we are on firmer ground.

There is an independent witness for the prosecution, Po Kywe (P.W. 29), who knew each of the appellants and saw them at about 7 p.m., as he passed from his house to bathe in the river. They were talking in the house of Nga Dwe in the company of Tun Shwe and Nga Dwe himself. The witness returned after the lapse of some fifteen or twenty minutes and they had all then disappeared. Before 8 p.m. Nga Dwe on his own confession had taken part in this dacoity, and Tun Shwe has been convicted of the same offence and has not appealed.

Thein Maung's story is that Tun Shwe was the ringleader and after he and other dacoits had drunk liquor with Ah Chet (from whom they bought the liquor; and Po Kha corroborates this), Tun Shwe led them out and while they were walking in the yo said "You all wait here. I will go and call three men": he left and came back two or three betel chews later with the appellants and Nga Dwe.

Po Kywe's evidence is very strong corroboration of this part of the story and goes to show that the approver's evidence that the appellants took part in the dacoity is true. Upon it I have no hesitation in saying that their convictions must stand.



Then there is evidence relating to a torch. A torch, Exhibit 3, was found at the house of the appellant Mya Gyi by the police. There is no dispute about it and it is not claimed that it was "planted" there, but this appellant says "Yes" but that torch belongs to me".

Now the torch was identified by Saw Ba, who gave evidence that it was a torch belonging to him, and that it formed part of the property stolen in the dacoity. I must admit that having approached this matter before my attention was called to Po Kywe's evidence I said to myself that one torch of a standard pattern might be very like another and that such evidence might be susceptible of mistake. But Saw Ba must know whether he had a torch or not, and he says he is able specifically to identify this torch by the fact that a screw at the back did not fit and that the sliding catch had been repaired. There is no reason why he should give perjured evidence on a matter of this kind; and no cross-examination whatever was directed to this part of his evidence, which therefore remained unshaken. And although Mya Gyi said the torch was his and he called two witnesses as to facts, no witness ever said he had a torch, much less that he ever owned the torch which is Exhibit 3.

As regards Tha Nge Gyi, once the guilt of Mya Gyi is proved, it must be asked whether it could be possible that he somehow became separated from the rest of the guilty persons if he left Nga Dwe's house in the company of Tun Shwe, Mya Gyi and Nga Dwe himself. He does not pretend that this was the case; his story is that he was not outside the house at all but was merely a visitor to Nga Dwe's house, and was unwell on this particular evening. In his examination at the Sessions Court his attention

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should have been directed to the evidence of Po Kywe, who said that this appellant was, talking with Mya Gyi, Tun Shwe and Maung Dwe. They were thus associated at a time immediately preceding the commission of the offence. The appellant's story is that he never left the house with them, but the inference that he did so, which may be drawn from Po Kywe's evidence, corroborates Thein Maung's evidence and is in agreement with the statement of the co-accused Nga Dwe and with the evidence of his wife Ma Than, who says that Tha Nge Gyi, Mya Gyi and Tun Shwe took her husband away. This was put to Nga Dwe, who said that being asked to go with them he did so.

I must briefly refer to one or two aspects of the trial which were unsatisfactory.

Exhibit 19 is a statement made by Saw Ba to the police after investigation of the crime had begun. It should not have been admitted in evidence or have found its way on to the exhibit file. Section 162 of the Criminal Procedure Code says plainly that such a statement cannot be "used" for any purpose except (as appears from the proviso thereto) to contradict the witness who has made it in the manner provided by section 145 of the Evidence Act. The advocate for the defence was, of course, entitled to see it in case he desired to use it for that purpose, but he was not obliged to put it in as evidence unless it was useful to him for that purpose. As it is, it was admitted to show, not that Saw Ba had made an earlier statement inconsistent with his evidence at the Sessions trial, but that he had made an earlier statement consistent with such statement. Statements to the police made in the course of their investigation must never be put in to help the prosecution as if they were

'admissible (which they are not)' under section 157 of the Evidence Act. 'It is a mistake to think that a document which the accused or his advocate has a right to inspect becomes evidence against the former from the mere fact of the inspection.

. Next care should be taken in all criminal cases to appreciate and apply, where necessary, the rulings of their Lordships of the Privy Council in *Pakala Narayan Swami v. King-Emperor* (1). This judgment is now reproduced (by reason of its great importance) in 1941 Rangoon at page 789 (*Ramdayal Mangilal v. The King*). It was published in Patna two years ago. Persons in custody may point out objects to a Magistrate or searcher but the statements which accompany the discovery of such objects are not admissible in evidence. For example Nga Dwe's statement to U Maung Kywe (P.W. 36) that a shirt pointed out by him was worn by the first appellant at the time of committing the dacoity was not admissible and should not have been recorded.

Wrongful admission of such statements might result in vitiating a trial and Sessions Judges cannot therefore be too guarded in the matter. In the present instance the conviction of the first appellant is fully justified on other grounds, and the error mentioned is therefore cured by the provisions of section 537 of the Criminal Procedure Code.

Next on page 129 of the record there occurs the use of terminology which is very misleading and will occasion mistakes on the part of the learned Additional Sessions Judge unless the subject matter is explained. The Court asked the appellants' advocate in the course of his cross-examination

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whether he was putting, questions from his own knowledge or according to instructions, or "whether they are fishing questions".

Now the limits of cross-examination are doubtless hard to define. But there is no objection whatever to an advocate putting questions remote from his instructions or personal knowledge: it may be that he thinks he may get an admission from the witness which may be of use to him on a relevant matter and if so he has a perfect right to put the question. Indeed it may be said without fear of contradiction that the accumulation of small and perhaps unexpected admissions in cross-examination furnishes a ready index to the skill of the cross-examiner. Not only is there no objection to the building up of a case by speculative cross-examination independent of one's instructions but the result may be of material assistance in arriving at the truth.

The term "fishing questions" is a term used by lawyers to indicate a particular kind of question sometimes endeavoured to be put in interrogatories in a civil suit but objectionable at that stage. The true object of interrogatories in a civil suit, putting it broadly, is that a litigant should be able to find out what facts he is obliged to prove, or what facts he need not prove because they are admitted, and what is the truth as to definite and existing circumstances which are not within his knowledge but in respect of which the opposing party can give him information. By this means expense is often saved, and surprise at the trial as to the true nature of the issues between the parties is averted. Such interrogatories as are "fishing", inasmuch as they set out not to elucidate the issues, but to ascertain the means by which an opponent seeks to prove his



case, or to establish as a fact some speculation on the part of the interrogator by means of which he hopes to build up a case of his own, are disallowed. But interrogatories are a branch of the law of discovery and questions which cannot properly be asked on discovery at all are most properly allowed to be put in cross-examination.

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The case of Nga Dwe is not before us. He has not appealed; but it is impossible to avoid noticing that he took no active part in the actual dacoity at all. He permitted the dacoits to assemble at his house and went with them and drank what is commonly called the "oath water", thus identifying himself with their concerted crime. The dacoits appear to have wanted seven men, and this seems to have been a matter of superstition on their part. Nga Dwe formally set foot on Saw Ba's premises but did not enter the house: he went home and took no further part in the dacoity. He was sentenced to six years' rigorous imprisonment in common with all the remaining dacoits. I think it right to acquaint the learned Additional Sessions Judge that this sentence was, in my opinion, too severe in the case of Nga Dwe. Although the case does not come before us judicially, yet having become acquainted with the facts of it judicially, I shall communicate with the Home Minister and state that in my view the proper sentence in the case was one of three years' rigorous imprisonment; this will be done in order that the authorities may have material on which they can take such action as may be considered desirable.

As stated before, the appeals of the present appellants against convictions under section 302 of the Penal Code are allowed, their convictions are set aside and the sentences of death passed upon

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them are not confirmed ; but their convictions for dacoity under section 395 and the sentences of six years' rigorous imprisonment passed upon them are upheld and their appeals in connection with this latter conviction and sentence are dismissed.

DUNKLEY, J.--I am in entire agreement with my Lord the Chief Justice. The offences committed by the appellants and their co-accused were clearly offences punishable under section 396 of the Penal Code, and the sentences passed on all of them, except Nga Dwe for the dacoity were grossly inadequate. It was most unfortunate that the learned Additional Sessions Judge struck out the charge under section 396 ; his purpose could have been attained by retaining this charge against all the accused, and adding to it, in the case of the two appellants, an additional or alternative charge under section 302 of the Penal Code. But in his order of 18th October, 1941, directing the amendment of the charges, the learned Additional Sessions Judge said this :

"I am satisfied that dacoity with murder under section 396, Penal Code, cannot be sustained."

This order amounted to an acquittal of all the accused on the charge that they committed dacoity and that one or more of their number committed murder in so committing dacoity. Consequently, it is not open to us, in appeals by the convicted persons, to alter their convictions to convictions under this section or to pass appropriate sentences on them, because the learned Additional Sessions Judge has held that the murder of Ma Saw Mya was unconnected with the dacoity, and apart from this murder the dacoity was a very minor affair.

Speaking for myself, I think it is extremely  
unfortunate that appeals were not filed by the  
Crown against the acquittals of all the accused on  
the charge under section 396.

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## APPELLATE CRIMINAL.

*Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice,  
and Mr. Justice Wright.*

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*S. 46, Cr. P.C.—Duty of the Police to arrest suspected bad hats—Person evading arrest—Police not to take needless risk, s. 34, Penal Code—Common intention—Criminal act pursuant to pre-arranged plan—Must be proved—Cannot be presumed.*

*Held* : If a person who is to be arrested attempts to evade arrest, all necessary means to effect the arrest may be used. It is no part of the duty of a policeman to undertake a needless risk of being killed by a person whom he conceives it to be his duty to arrest. An innocent person should give himself up when the police call upon him to do so.

A police officer after several warnings fired at a house in which a person to be arrested had taken shelter to avoid arrest. The man wanted was not visible from outside. The shot killed the person inside the house. Held there was no murder as intent to commit the crime was absent.

*Held* : If the principal police officer under the above circumstances, be guilty of no offence, the subordinates could not have a common intention to commit it.

*Held further* : Common intention within the meaning of section 34 of Penal Code implies a pre-arranged plan and a criminal act done in concert pursuant to the plan.

*Mahbub Shah v. K.E.*, 72 I.A. 148, followed.

Common intention cannot be presumed. It is a question of fact not depending on a legal presumption but upon inference to be drawn from proved facts, and this inference must be one which it is strictly necessary to draw.

*Mahbub Shah v. K.E.*, 72 I.A. 148 and *K.E. v. Nga Aung Thein*, 13 Ran. 210 at p. 215, followed.

*Campagnac* for the appellants.

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\* Criminal Appeals Nos. 1064 and 1065 of 1946 and Criminal Reference No. 107 of 1946 against the order of First Special Judge, Thayetmvo, in Criminal Regular Trial No. 22 of 1946.

*Chan Tun Aung* (Government Advocate) for the Crown.

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ROBERTS, C.J. and WRIGHT, J.—The appellant Maung Aye was convicted by the First Special Judge at Thayetmyo of the murder of one Hla Tin at the village of Kya-in on February 7th last, and was sentenced to death. He was also convicted of an offence under section 436 of the Penal Code (that is, mischief by setting fire to a dwelling house), and was sentenced to seven years' rigorous imprisonment. The other two appellants, Maung Kyaw and Daw Gyi, were convicted of having a common intention with Maung Aye and with each other to commit these offences, and were sentenced to transportation for life in respect of the murder and to seven years' rigorous imprisonment in respect of the mischief by fire, the sentences to run concurrently.

The true facts in the case are greatly in dispute and by no means easy to ascertain: and we are indebted to the learned Special Judge for his clear and careful judgment, and to the advocates in this Court for their assistance.

All the appellants are police officers, Maung Aye being a head constable of some sixteen years' experience, and the remaining appellants who are Chins being young policemen comparatively new to the force. The case for the prosecution was that they visited Kya-in village and began by picking a quarrel with the villagers, and especially with the headman U Po Lu and his brother Hla Tin, over the non-arrival of some bullock carts they had ordered. Then, Maung Aye uttering threats against the headman, they all proceeded to Hla Tin's house, Maung Aye and the third appellant Daw Gyi were armed with rifles, but the second appellant

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Maung Kyaw was not armed. It is contended that the rifles were fired in the direction of Hla Tin's house but that at first the shots went wide; that then Maung Aye ordered Hla Tin to come out of his house but that the latter persisted in remaining in his house despite these orders; that Maung Kyaw handed Maung Aye a box of matches and that Maung Aye ignited or tried to ignite part of the walling of the kitchen of Hla Tin's house which was made of split bamboo; that ultimately the house became ignited by the deliberate act of Maung Aye; that while Hla Tin from inside the house was trying to put out the fire Maung Aye fired again and shot Hla Tin in the right groin and inflicted on him injuries which were necessarily fatal and from which he died about an hour later, and that the fire could not be controlled. Some 26 houses were burnt out. It is further contended that all the appellants had a common intention to commit murder and the offence of mischief by fire as charged. It has been clearly proved that the gun-shot wound inflicted on Hla Tin was necessarily fatal and that he died within about an hour.

The case for the defence is that the appellants visited the village but that they picked no quarrel there; that two of the prosecution witnesses prove that the bullock carts were ready and that the story of the quarrel is an invention; that Maung Aye had reason to believe that Hla Tin had a Sten gun in his possession, and being suspicious he ordered Hla Tin to come down from his house; that Hla Tin persistently remained there in defiance of the head constable's order: the latter's suspicions increasing he used every artifice to prevent Hla Tin evading arrest. Evidence has been given that much lawlessness prevailed in the neighbourhood and that



police officers who try to effect arrests in some villages are in grave danger of losing their lives. In one recent instance a policeman who entered a house to search for miscreants was shot and killed at close range. This evidence was admissible under section 11 of the Evidence Act as throwing light upon the means which a police officer might find it necessary to employ in carrying out his duties at this period in that area.

The defence rely on section 46 of the Criminal Procedure Code, the material part of which enacts that if a person who is to be arrested attempts to evade arrest *all means* necessary to effect the arrest may be used. The operation of the provisions of the third sub-section has been suspended by section 14 (g) of the Courts (Emergency Provisions) Act, 1943.

In order to effect Hla Tin's arrest without running the risk of entering the house when the police might be taken unawares, the defence say that Maung Aye pretended to set fire to the house and they say that the prosecution witnesses bear this out.

U Po Lu the headman said "Maung Aye and Maung Kyaw told the inmates of Hla Tin's house to come down lest they would set fire to the house". Aung Shwe the headman's son said "I noticed Maung Aye setting fire to the house three times in the same place while demanding Hla Tin to get down from the house. To me it appeared that he set fire to the house to make Hla Tin descend from it". Maung Kyaw Hla (P.W. 3) said "Maung Aye told Hla Tin he would burn the house if he did not descend". The witness explains that Maung Aye then set fire to the walling and continues "Calling up Hla Tin to get down from the house

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Maung Aye put out that fire but then burnt it again. In that manner he did three times and before long the conflagration increased". Maung Po Shwe (P.W. 7) said when recalled "Maung Aye tried to put out the fire which he set to the walling of the kitchen every time he struck out the match but on the last time he could not control the fire". Maung Tun Thein (P.W. 8) said "Maung Aye struck out the match which he received from Maung Kyaw and burnt the north-west corner of the house. In so doing Maung Aye told Hla Tin to descend from the house. He put out the fire again but set fire to the house before long. He did so for three times".

Still Hla Tin continued to evade arrest, according to the contentions of the defence. Maung Aye said in his examination by the Court that he did not shoot the deceased intentionally but "in scaring away the bad hat to come down I shot the roof of the house".

Now we cannot but regard it as most unfortunate that Maung Aye did not avail himself of the opportunity to give evidence on his own behalf on oath and that he did not submit himself to cross-examination. There can be no doubt whatever but that the fatal injuries received by the deceased were inflicted on him as the result of a gun shot fired by Maung Aye. The difficult question for decision is whether Maung Aye was using, in order to effect arrest, means which by then had become necessary in the exercise of his lawful duty.

There is a conflict of evidence with regard to this shooting. U Po Lu the headman had apparently left the scene. He said in his evidence that as soon as the house caught fire he made haste to



go to the police station and report, but when he was recalled to give evidence for the third time he said "I now remember that Maung Aye had fired an additional shot from the north-west of the house just before he set fire to the house. He fired three shots". We think it is wrong to say that the third shot was fired before the house became alight. As will presently appear it was not before but just afterwards.

Aung Shwe says that three shots were fired and that the last shot was fired by Daw Gyi. In this again we think he is mistaken because of the much more detailed evidence of Kyaw Hla (P.W. 3) and Tun Shein (P.W. 8), who each ascribe the last shot to Maung Aye. Kyaw Hla said that, when the conflagration increased, "At that time Hla Tin from his house entreated Maung Aye saying, 'Bogyi allow me to put out the fire'. Maung Aye said that he could do so but Hla Tin made a request that he should not be shot with rifle. Maung Aye replied that he would not. Whereupon Hla Tin went down to the kitchen floor. At that point Maung Aye fired a shot at Hla Tin from the west side of the house. I next heard Hla Tin cry out 'Bogyi I have received a gunshot'. Maung Aye then went out of the compound".

When this witness was recalled he said "I heard the voice of Hla Tin alone from his house. His voice came from the main building of his house". It is necessary to explain here that the west part of the house is a kitchen annexe divided into three compartments with waterpots at the north-western corner. Maung Aye, however, would not know all that was in the interior of the house for the greater part of it would be hidden from view. The witness continued "I heard Hla Tin ask for leave

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to extinguish the fire. After Maung Aye had told him that he could do so and that he would not shoot him Maung Aye fired a shot into the kitchen. I then heard Hla Tin shout out that he had been shot at. It was only then that I knew that Hla Tin had gone into the kitchen".

These last words are very important. It is apparent that the witness could not see Hla Tin. He heard his voice but did not know he had gone into the kitchen till after he had been shot. Kyaw Hla then says that the lower floor of the house was entirely exposed. But he adds "I did not know whether Hla Tin fell inside the house or not as the result of the rifle shot". This makes it extremely difficult to judge whether, at the time this shot was fired, Hla Tin could be seen by Maung Aye; or whether Maung Aye fired a warning shot into the kitchen where he had no reason to suppose Hla Tin would be, having heard his voice from another part of the house.

Ma Saw Nyun, the widow of Hla Tin (P.W. 11), says "The floor of the kitchen was about 4 cubits from the ground. It was about 6 inches lower than the main flooring. There were bamboo mat walling around the kitchen. The walling round the house was nailed securely but that in the kitchen was merely tied with split bamboo. The two front doors were the only passage for us to go down from the house. It was not possible to force ourselves through the walling".

Since the house was burnt to ashes it was naturally impossible to make any model or drawings: but as Hla Tin's widow says that the bamboo mat walling was "around" the kitchen and not merely on one side of it, it certainly seems as though persons outside the house could not see into the kitchen.

On the other hand, there is the evidence of Maung Tun Thein (P.W. 8). He is extremely hostile to the defence and said that Maung Aye said to Hla Tin "You better come down from the house or else I will shoot you with my rifle". None of the other prosecution witnesses say this. He also said that after the fire had started the police deterred the villagers from approaching the house at the point of their guns, and none of the other prosecution witnesses say this either. Not a single witness was called who says he was stopped by any of the appellants from putting the fire out. On the contrary, Kyaw Hla says that directly Hla Tin cried out that he was shot Maung Aye left the compound.

When Maung Tun Thein was recalled, but not before, he said "I actually saw Hla Tin go down to the floor of the kitchen to put out the fire with water. I saw this from the *kyanbyin* of my mother's house. I was the person who built Hla Tin's house. I could see Hla Tin go as far as about 2 fathoms to the northern walling of the kitchen. He threw water from the southern compartment but was in vain. There was a row of waterpots along the partition inside the kitchen. Hla Tin was about 5 cubits from the northern walling when Maung Aye fired a shot at him. He was shot at the point of his throwing water on the fire".

Now if Kyaw Hla could not see, how could Maung Tun Thein see all this? The latter was at the *kyanbyin* of his mother's house west of Hla Tin's house. Kyaw Hla was also at the west of the house and so close that he not only saw but heard the conversation before the fatal shot was fired. He and his family lost possessions to the value of about Rs. 5,000 in the fire and he has no reason to show much consideration to Maung Aye who started it.

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Yet he says that although he was watching the whole of these incidents he only knew that Hla Tin had gone into the kitchen at all when he heard the cry from him that he had been shot. It is impossible in the face of this conflict of testimony to be at all certain whether at the time of shooting Maung Aye could see Hla Tin or not. I should incline to the probability that he could not do so, any more than Kyaw Hla, but we are not dealing with the balance of probabilities here but with proof adduced by the prosecution which must be beyond all reasonable doubt.

Now taking the charge of murder first, can the prosecution prove that the appellant Maung Aye caused death by an act committed with the intention of causing such bodily injury as was sufficient in the ordinary course of nature to cause death. If they could show beyond all reasonable doubt that Maung Aye fired at the accused intending to hit him we might then have to consider whether there was any mitigating factor which might reduce the crime to culpable homicide, or indeed any lawful excuse which might exculpate him altogether. In our judgment, the prosecution have failed to prove beyond all reasonable doubt that Maung Aye fired at the accused's body intending to hit him; what they have proved is that he fired at the house in which Hla Tin was; it is by no means clear beyond reasonable doubt that Hla Tin was visible to this appellant when the shot was fired, and in the circumstances of this particular case the intention to cause such bodily injury as was sufficient in the ordinary course of nature to cause death cannot be imputed to him.

That does not conclude the difficulty. It is *prima facie* murder if the person committing the act knows



that it is so imminently dangerous that it must in all probability cause such bodily injury sufficient in the ordinary course of nature to cause death, or such bodily injury as is likely to cause death and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid..

Now firing at a small house in which there is one person who may be moving about is an imminently dangerous act. Would it in all probability cause such bodily injury as was likely to cause death? Much must depend on circumstances; there is a possibility certainly, but to say that in all probability the sole occupant of the house is likely to receive fatal injuries even though he may not be visible seems to us to be pushing the doctrine of chances rather far. The illustrations given in the text books relate to acts of different kinds, such as firing into a crowd. Fortunately, however, we do not feel called upon to decide this question, for in our judgment the appellant either possessed a valid excuse for incurring the risk of causing death to Hla Tin, or has in his defence raised the doubt as to whether this excuse may not have been in fact a valid one.

It must first be decided whether he thought that Hla Tin was, in his own words, "a bad hat" whom it was his duty to arrest. The prosecution witnesses say in effect that Hla Tin was of good character and at least one of them says he was never armed at all. Maung Aye may nevertheless in good faith have believed it his duty to arrest him, or to question him further and if necessary to search his house.

Now in order to ascertain the good faith, or the want of good faith, of Maung Aye in this matter we have considered U Po Lu's evidence. He made

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the first information report and when he was recalled he was cross-examined about the incidents. He said:

"It is not true that Maung Kyaw then pointed out to Maung Aye that he saw a man suddenly go up to a house with a Sten gun. It is not true that Maung Aye suggested that the house should be surrounded as the man was believed to be an absconder."

In order to shake this testimony Mr. Carrapiett was called by the Defence. He is the Subdivisional Officer at Allanmyo and he says:

"As far as I remember, U Po Lu, headman of Kya-in, appeared at the P.S. and made a report to the P.S.I. about the incident at Kya-in. According to him, a police party headed by Maung Aye arrived with 3 Chin A.P.Cs. at about 3 or 4 p.m. Maung Aye asked for carts for their return to Sinbaungwe. He (headman) in turn asked the villagers to supply the carts. Later, Maung Aye threatened him for the delay in the supply of the carts. After that, he and the police party went along the road and in front of his brother Hla Tin's house, Hla Tin insulted the villagers for having been late to supply the carts. Maung Aye was annoyed with Hla Tin saying that the latter had insulted him. He then said that he suspected Hla Tin to have firearm with him. He then demanded Hla Tin to get down from the house. As Hla Tin did not get down from the house, Maung Aye said that Hla Tin was concealing himself in the house and that he would set fire to it. He then asked for a match box from a Chin P.C. and set fire to the kitchen of the house. Hla Tin addressing Maung Aye as Bo Gyi sought for leave to put out the fire burning the kitchen, and as he came out to put out the fire, Maung Aye fired a shot at him with rifle. After Po Lu had made a report to that effect, the P.S.I. instructed the S.W. to make a note of the report in the General Diary."

The important part of this is that before anyone at Sinbaungwe had been told of it from any other source U Po Lu was reporting that Maung Aye

openly stated in the village "that he suspected Hla Tin to have firearm with him". It is therefore not an afterthought on the part of the appellants. Since, it is now quite plain that this statement was made by Maung Aye in Kya-in village before the setting alight to the house, or the shooting at it when Hla Tin was inside, it is also clear that Hla Tin was evading arrest. What is more the circumstances must have increased any suspicions which may have been entertained by Maung Aye. Hla Tin's wife came with the children down from the hut, but to quote Aung Shwe (P.W. 2), Hla Tin persisted in remaining inside in defiance of orders. He even allowed the pretence of setting fire to the hut; nothing would induce him to come out.

In those circumstances what were the police party to do? If they had merely left their duty and gone home they might well have been charged with neglect of duty and even probably with cowardice. The experience of the police shows that if they had attempted to storm the house and the deceased had really been armed (and the suspicion may very well have grown with them that he was armed), one or other of them might well have been murdered.

It is no part of the duty of a policeman to undertake a needless risk of being killed by a person whom he conceives it to be his duty to arrest: an innocent man should give himself up when the police call upon him to do so; a man concealing himself, even in his own house when called to come out, lays himself open to the gravest suspicion.

Every case of this kind must be judged by its own set of facts and we must not be taken to lay down a general rule as to the propriety of any particular course of action on the part of police officers when confronted with difficulties of this sort.

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It is enough to say that in these circumstances Maung Aye may very well have been justified in firing at the house as a last extremity in order to effect the arrest of Hla Tin. This is all that the prosecution have proved that he did.

We are not satisfied with the prosecution story that the quarrel, if any, began over the delay about the bullock carts, still less that Maung Aye uttered threats to the headman. He may have said that the headman was "cheeky" but the whole of the defence is supported by the action which the prosecution witnesses prove he took. On entering the compound, shots were fired wide of the house. If Maung Aye intended to kill Hla Tin as the prosecution witnesses or some of them seem to indicate, his conduct was wholly inexplicable. He kept asking Hla Tin to come down. He did not allow the fire to spread but put it out twice. It would have been easy to burn the house down with Hla Tin in it, if murder had been contemplated. It would have been easy to order the other appellants all to fire at the house and by repeated shooting to ensure the death of Hla Tin if murder had been contemplated. It is quite clear that murder was not contemplated. What was contemplated and intended was the arrest of a supposed offender.

It is, of course, true that the shot fired killed Hla Tin and that the fire kindled spread until it did immense damage. But the answer to this is that these were the accidental results of the drastic measures which were found necessary in attempting to bring about the arrest of Hla Tin.

The Special Judge said in the course of his judgment that there was very little doubt that these incidents took place when the whole of the police party were in an intoxicated condition, and that

they were not discharging their duty at the time. In spite of the careful consideration which he gave to the facts we think he was wrong in reaching these conclusions. Maung Ngwe (D.W. 10) does *not* as the Judge suggests say that any of the accused were drunk. Maung Tun Thein (D.W. 12) does say they were intoxicated but not to the extent of not being able to control themselves and Maung Sit Aung (D.W. 13) says he took toddy with the police party and was not himself intoxicated but "cannot vouch" for the sobriety of the police. But what is far more important is the case for the prosecution. Not a single one of the villagers of Kya-in say that any of the appellants were intoxicated. If this was part of the case for the Crown they ought at least to have been given some opportunity of saying so. U Po Lu the headman does not mention it, nor does his son Aung Shwe. Kyaw Hla and the 8th prosecution witness the other Maung Tun Thein do not say a word about intoxication, nor do Maung Mya (P.W. 5), Ma Ban (P.W. 9), Ma Mya Myin (P.W. 10), Ma Saw Nyun (P.W. 11), Hla Tin's widow who came down from the hut, nor do either of the men with bullock carts, Maung Aung Hman (P.W. 14), and Maung Saw Hlaing (P.W. 16). Only Maung Po Shwe (P.W. 7) had this point put to him. He said in examination-in-chief "I do not know whether the policemen were drunk". Even this suggests that the question was put in a leading, and therefore inadmissible, form—"Were the policemen drunk?" Whereas the proper form would be "Did you notice anything about the condition of any of the policemen?" The answer on the record would not refer to drunkenness at all unless that state had been wrongly suggested to the witness.

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Here, therefore, are no fewer than ten of the villagers of Kya-in into whose heads the idea of drunkenness on the part of any of the police party seems never to have entered. It is scarcely possible to imagine, still less to hold beyond all reasonable doubt, that this was a party of drunken men bent on mischief and not trying to discharge their duties at all.

We must refer briefly to the case against the other two appellants. Holding as we do that Maung Aye committed no offence, it would ordinarily be enough to say that the two subordinate constables could not have a common intention with him to commit any offence, but the Special Judge naturally had to deal with the law regarding common intention in his judgment. In this connection he had not the benefit of having before him the recent decision of the Judicial Committee of the Privy Council in *Mahbub Shah v. King-Emperor* (1). It was there held that "common intention" within the meaning of section 34 of the Penal Code implies a pre-arranged plan and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. Sir Madhavan Nair said "In their Lordships' view the inference of common intention within the meaning of the term in section 34 should never be reached unless it is a *necessary* inference deducible from the circumstances of the case".

Their Lordships explained that "it is difficult if not impossible to procure direct evidence to prove the intention of an individual: in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case".

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(1) 72 I.A. 148.



In *Mahbub Shah v. King-Emperor* (1) the facts were that one Allah Dad with a few others left their village to cut reeds growing by a river, and ignoring a warning by the owner of certain land they cut reeds growing upon it. On their return journey they chanced to come upon the owner's nephew Ghulam, who was standing by the river bank, and who demanded the return of his uncle's reeds. This was refused and on Ghulam trying to intercept the boat, Allah Dad struck him with a ten-foot pole. Ghulam shouted for help. Wali Shah and the appellant who happened to be shooting game near by arrived upon the scene with guns. Wali Shah shot Allah Dad dead and the appellant shot at and injured another of the reed gatherers. It was held that the appellant was not shown to have had any common intention that murder should be committed: the only common intention proved as a necessary inference was to rescue Ghulam if need be by using the guns.

There is no question of "presuming" common intention: as was pointed out by Page C.J. in *King-Emperor v. Nga Aung Thein* (2): "No *presumptio facti* or *juris* arises in such cases, the question of fact not depending on a legal presumption but upon the inference that the Court draws from the evidence adduced at the trial". And their Lordships of the Privy Council have laid down that this inference must be one which it is strictly necessary to draw. For instance, the necessary inference may no doubt be more readily drawn in the case of persons unlawfully armed and engaging upon a criminal enterprise, than in the case of those who are lawfully armed and are *prima facie* engaged in

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(1) 72 I.A. 148.

(2) 13 Ran. 210 at p. 215.

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the exercise of a legal right or in pursuance of a public duty.

The result of these appeals is that each of them is allowed ; the convictions and the sentences passed upon each of them are quashed. Each of them is acquitted and so far as these charges are concerned must be forthwith set at liberty.

## APPELLATE CRIMINAL.

*Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice,  
and Mr. Justice E Maung.*

## TUN HLAING AND OTHERS v. THE KING.\*

1946

Nov. 27.

*Murder charge—Lack of legal assistance—de novo trial.*

*Hdd.*: It must be the invariable rule that persons put upon their trial in circumstances which indicate that charges of murder would be preferred against them should have legal assistance from the outset ; otherwise there must be a *de novo* trial.

*Daniel* for the appellant.

*Chan Tun Aung* (Government Advocate) for the respondent.

ROBERTS, C.J. and E MAUNG, J.—We very much regret to observe that the Special Judges who have tried this case have caused waste of precious time and trouble, great inconvenience and expense, and the necessity for a new trial through failure to observe the most elementary principles of justice.

It appears that six men were brought before U Tun Hmi in a case which, from the first, he must have known was an alleged case of robbery with murder, and he must have known also that there would be evidence that some of the accused were armed, and that an inquiry of the most careful nature was necessary. The case was sent up for hearing on the 20th May, 1946. On the 4th June, 1946, U Tun Hmi, the Special Judge, examined seven out of eight prosecution witnesses. The accused were undefended, and the prosecution case went on from

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Criminal Appeals Nos. 1177 and 1244 of 1946, Criminal Reference No. 119 of 1946 from the order of U Saw Lwin, Special Judge of Shwebo, passed in his Criminal Regular Trial No. 33 of 1946.



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day to day until the proceedings were transferred to U Saw Lwin, who undertook the trial of the rest of the case. Of course, he should not have gone on with it, bearing in mind the glaring mistake made by his predecessor. It was not until the 2nd of September that he asked the accused whether they would like Government to engage a lawyer to defend them. At that stage they naturally, and very wisely, said no.

It must be the invariable rule that persons put upon their trial in circumstances which indicate that charges of murder would be preferred against them should have legal assistance from the outset; and although U Saw Lwin tried to repair the blunder of his predecessor, the offer of an advocate came much too late, when no opportunities to cross-examine the prosecution witnesses were available. The consequence is that there must be a *de novo* trial.

## APPELLATE CIVIL.

Before Mr. Justice Mya Bu and Mr. Justice Dunkley.

DORAGAYYA

v.

IRRAWADDY FLOTILLA CO., LTD.\*

1941

Dec. 23.

*Workmen's Compensation Act, s. 3 (1)—Accident arising out of employment—  
Workman in place of danger—No evidence as to how accident happened—  
Inference to be drawn from circumstances—Sweeper on board a steamer—  
Death by falling overboard—Sweeper not required to be in place of  
danger—Accident not arising out of employment.*

If the Commissioner under the Workmen's Compensation Act, having on the balance of probabilities negatived violence and suicide, and considering the circumstances that the workman was in a place where his employment compelled him to be, which place had an element of danger sufficient to account for the death, drew the inference that the death was an accident arising out of and in the course of employment, that was an inference that could not be set aside merely because the evidence was merely circumstantial, and certainty as to how the accident actually happened was unobtainable. But this must be an inference which can properly arise from the ascertained facts, and not a mere surmise or conjecture.

\* The duties of a sweeper on board a steamer do not bring him to the rail of the vessel, or compel him to be in a place where he is in danger of falling overboard. The Commissioner would be justified, in the absence of any materials to show how the sweeper fell overboard and met his death, in holding that the accident did not arise out of the deceased's employment.

*Fisher v. London, Midland Railway Co.*, (1931) A.C. 351; *Kerr v. Ayr Steam Shipping Co., Ltd.*, (1915) A.C. 217, 233, referred to.

*Bharadva* for the appellant.

*Beecheno* for the respondent.

DUNKLEY, J.—The appellant, Doragayya, is the father of the deceased Ellayya, who was a sweeper employed on the steamer "Sinkan", belonging to the respondents, the Irrawaddy Flotilla Company, Limited. On the afternoon of the 10th November,

\* Civil Misc. Appeal No. 54 of 1941 from the order of the Commissioner in Workmen's Compensation Case No. 62 of 1940, Rangoon.

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1940, while this steamer was proceeding along the Bassein Creek, the deceased Ellayya fell overboard and was drowned. The appellant then made an application to the Commissioner for Workmen's Compensation of Rangoon for compensation under section 3 (1) of the Workmen's Compensation Act. His application was dismissed, and he has brought this appeal to this Court under the provisions of section 30 of the Act. It must be borne in mind that an appeal to this Court only lies if a substantial question of law is involved in the appeal.

Section 3 (1) of the Act lays down that compensation shall be payable only in those cases where personal injury is caused to the workman by accident arising out of and in the course of his employment.

The respondent Company at once conceded that Ellayya met his death by accident, although there is no evidence as to the circumstances under which he fell from the steamer into the water, and it is further conceded, as it must be conceded, that this accident arose in the course of Ellayya's employment. Consequently, the sole question which fell for decision by the learned Commissioner for Workmen's Compensation was whether the accident arose out of Ellayya's employment. He answered this question in the negative and dismissed the application. The only question of law which can arise out of this finding of the Commissioner is whether there were materials on which he could find as a fact that the accident did not arise out of the employment.

There is no evidence in this case to show how Ellayya came to meet with his death. He was employed on this steamer, and he was undoubtedly on board the steamer on that day, and it is a permissible inference that he had during the day



been carrying out his ordinary duties. But the only evidence in regard to the accident is that a splash was heard and then the deceased was seen to be struggling in the water and was carried away, and although attempts were made to save him they were not successful. A witness named Kamayya, a servant of an engineer employed on this steamer, stated in his evidence that he saw the deceased with a broom and a bucket near the kitchen, and a few moments afterwards heard the splash. The learned Commissioner has disbelieved this witness's statement that he saw the deceased with a broom and a bucket near the kitchen, and that finding of fact is binding on us. Consequently, all that the evidence discloses is, first, that the deceased was on board this steamer, and, secondly, that from some entirely unknown cause he fell into the water and was drowned.

We have been referred to a large number of cases of the House of Lords and the English Court of Appeal concerning applications for compensation under the English Workmen's Compensation Act in respect of deaths of persons whose deaths were entirely unexplained by evidence. It is unnecessary for me to burden this judgment with a list of these cases, for they were all considered by the House of Lords in *Fisher or Simpson v. London, Midland and Scottish Railway Company* (1). In that case, a railway guard who was travelling on duty in a train fell from the train and was killed in circumstances which were surrounded with mystery, and the House of Lords held that the arbitrator (*i.e.* the Commissioner for Workmen's Compensation in this country) was entitled on the facts

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found to draw the inference that the accident to the deceased arose out of, as well as in the course of, his employment. In that case Lord Dunedin, after reviewing all the authorities, said this :

DUNKLEY, J. " Putting aside violence from without, and such action of the deceased as is equivalent to suicide, or at least to some exposure to an added peril, the result of the cases of unaccounted for death seems to me to be as follows :

If the deceased was in the course of his employment, if there are facts from which it may be deduced that his employment brought him within, or allowed him to be within, proximity of the peril to which his death could properly be ascribed, and the arbitrator comes to the conclusion that the accident which causes death arises out of, as well as in the course of, his employment, his judgment should not be disturbed. Equally if he comes to the opposite conclusion it ought not to be disturbed."

Now, the burden of proving that the accident arose out of the employment is upon the applicant, and in regard to the discharge of this burden, Lord Dunedin in *Simpson's* case (1) said this :

" . . . if the arbitrator, having on the balance of probabilities negatived violence and suicide, and considering the circumstances that the man was in a place where his employment compelled him to be, which place had an element of danger sufficient to account for the death, drew the inference that the death was an accident arising out of and in the course of employment, that was an inference that could not be set aside merely because the evidence was merely circumstantial, and certainty as to how the accident actually happened was unattainable."

But this must be an inference which can properly arise from the ascertained facts, and not a

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(1) (1931) A.C. 351.

mere surmise or conjecture. In *Kerr or Lendrum*  
*v. Ayr Steam Shipping Company, Limited* (1),  
 Lord Shaw of Dunfermline said :

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"The distinction is as broad as philosophy itself. It is that an inference rests upon premises of fact and a conjecture does not."

DUNKLEY, J.

The duties of a sweeper on board a steamer do not bring him to the rail of the vessel, or compel him to be in a place where he is in danger of falling overboard, and, consequently, there were no facts in this case from which the learned Commissioner for Workmen's Compensation could infer that the accident arose out of the deceased's employment, and his decision that it did not so arise was a decision at which he could reasonably arrive on the materials before him. A finding that the accident arose out of the employment would have been a finding based upon a mere conjecture, and not upon inference.

There are no grounds on which we can interfere with the Commissioner's finding in this case, and this appeal is dismissed with costs, advocate's fee five gold mohurs.

MYA BU, J.—I agree.



## APPELLATE CIVIL.

*Before Mr. Justice Mya Bu and Mr. Justice Sharpe.*

1941

Nov. 17.

A.R.O.V.R. CHETTYAR

v.

THENAMMAI ACHI AND ANOTHER.\*

*Insolvency.—Application against Receiver's act—Extension of time of limitation for sufficient cause—Limitation Act, s. 5—Burma Insolvency Act, ss. 68, 78 (1).*

An application under s. 68 of the Burma Insolvency Act can be admitted after the period of twenty-one days prescribed by the proviso to that section, when the applicant satisfies the Court that he had sufficient cause for not making the application within such period. S. 78 (1) of the Burma Insolvency Act provides, *inter alia*, that the provisions of s. 5 of the Limitation Act shall apply to applications under the Act, and an application under s. 68 is necessarily an application under that Act.

*Jhan Bahadur Singh v. The Bailiff, District Court of Toungoo*, I.L.R. 5 Ran. 384; *K. Lingayya v. Narayana*, I.L.R. 41 Mad. 169 (F.B.); *Menon v. Secretary of State for India*, I.L.R. 34 Mad. 505, distinguished.

Where any question of limitation affecting the competence of an appeal arises, the procedure to be adopted should be such as to secure at the stage of admission the final determination of the question, after due notice to all parties and not to leave it for determination at the hearing of the appeal itself.

*Krishnasami v. Ramasami*, I.L.R. 41 Mad. 412 (P.C.), followed.

*P. K. Basu* for the appellant.

*F. S. Doctor* for the respondents.

MYA BU, J.—This is an appeal against an order of the District Court of Tharrawaddy under section 68 of the Burma Insolvency Act (V of 1920). The order granted the application of the first respondent, one of the creditors of the insolvent P.L.S.P.L. Palaniappa Chettyar was who adjudicated in 1934. Upon the making of the order of adjudication the second respondent U Maung Maung, Bailiff of the District

\* Civil Misc. Appeal No. 16 of 1941 from the order of the District Court of Tharrawaddy in Insolvency Case No. 2 of 1934.

Court of Tharrawaddy, was appointed receiver and as such received charge of the properties of the insolvent including certain mortgage deeds in favour of the insolvent. On the 1st February 1937 the first respondent conveyed the right, title and interest of the insolvent upon a number of the aforesaid mortgages in favour of the appellant who was none other than the insolvent's agent for a price exceedingly incommensurate with the *prima facie* value of the mortgages. This sale was effected by private treaty and not by public auction. The first respondent who was represented in the insolvency proceedings in the District Court and is represented in this appeal by her agent S.A.R.S. Arunachalam Chettyar filed the application, which has given rise to this appeal, on the 27th July 1939—nearly 2½ years later—praying that the sale effected by the receiver might be set aside as having been vitiated by fraud and collusion between the receiver, the insolvent and the first respondent. There can be no doubt that such an application is permitted by section 68 of the Act. That section, however, provides that no application under it shall be entertained after the expiration of twenty-one days from the date of the act or decision complained of. For the purpose of surmounting this obstacle the first respondent had an affidavit of the agent annexed to the application of the 27th July 1939. In the affidavit are set out, *inter alia*, the following statements :

[His Lordship set out four paragraphs of the affidavit to the effect that the agent came to know from his lawyer in July 1939 about the transfer, that he caused search to be made in the Registration Office regarding the particulars of the transfer, and after further inquiries instructed his lawyer to make the application.]

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Needless to say that these statements were made for the purpose of invoking the aid of the provisions of section 5 of the Limitation Act although no specific application was made under that section.

The appellant opposed the application both upon merits and as being time-barred. The latter ground of objection raised two questions, namely, (1) whether the provisions of section 5 of the Limitation Act may be invoked to enlarge the period mentioned in the proviso to section 68 of the Burma Insolvency Act and (2) if so, whether there was sufficient cause for not making the application within such period.

The learned District Judge having answered both these questions in the affirmative and having upon the merits of the case found that the price at which the sale was made was grossly inadequate ordered the sale to be set aside.

All the points taken by the appellant in the District Court have been urged on his behalf in support of the contention that section 5 of the Limitation does not apply to the case. The Full Bench decision of the Madras High Court in *Kopparthi Lingayya v. Araveti Chinna Narayana* (1) has been relied on. That decision was given under the Limitation Act (IX of 1908) and the Provincial Insolvency Act (III of 1907) laying down that recourse could not be had to the general provisions of the Limitation Act in dealing with the admission of petitions and appeals presented after the time prescribed under the provisions of the Provincial Insolvency Act as such recourse would affect the specially prescribed period of Limitation within section 29 (1) (b) of the Limitation Act as it then stood. The question that actually arose was

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(1) (1917) I.L.R. 41 Mad. 169.



whether section 4, 5 or 12 of the Limitation Act of 1908 were applicable to appeals under the Provincial Insolvency Act (1907) and was therefore concerning the effect of section 46 (4) of the latter and section 29 (1) (b) of the former. Section 46 (4) of the then Provincial Insolvency Act prescribed periods of limitation for appeals to the District Court and to the High Court under the previous sub-sections by fixing thirty days and ninety days respectively ; while section 29 (1) (b) of the Limitation Act, as it then stood, provided that nothing in the Act " shall affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter " in force in British India". Inasmuch as the Provincial Insolvency Act (1907) made no provision whatever for the applicability of the general provisions of the Limitation Act (1908), the provisions *inter alia* of section 5 of the Limitation Act could not be invoked to affect or alter the periods of limitation fixed by the Provincial Insolvency Act, or such other special Act, as the Madras Forest Act, 1882—*Krishna Menon v. The Secretary of State for India in Council* (1). If the law on the subject stands now as it stood before the enactment of the existing Provincial Insolvency Act (V of 1920) called the Burma Insolvency Act since the separation of India and Burma, the ruling in the case of *Kopparthi Lingayya* (2) must readily be adopted. The law has, however, undergone changes since. The Provincial Insolvency Act (V of 1920) repealed Act III of 1907 entirely, section 46 of which having been substituted with certain verbal changes by section 75 of the Act, the sub-section prescribing the periods of limitation

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remaining in the same words. The new Act also made provision for the relaxation of its own rules as to limitation by enacting section 78 of which the first sub-section runs as follows :

"The provisions of sections 5 and 12 of the Indian Limitation Act, 1908, shall apply to appeals and applications under this Act . . . . ."

This section is new ; it found no place in the repealed Act of 1907. Section 29 of the Limitation Act was amended by Act X of 1922. Thus, the relevant portion of the present section 29 which is to be found in sub-section (2) is that for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law—(a) the provisions contained in section 4, sections 9 to 18 and section 22 shall apply only in so far as and to the extent to which they are not expressly excluded by such special or local law ; and (b) the remaining provisions of this Act shall not apply. Thus, under the old section 29 none of the provisions of the Limitation Act were applicable to proceedings under any special or local law unless they were expressly included in such law ; whereas under the new section some of them, namely, those contained in section 4, sections 9 to 18 and section 22 are applicable without being expressly included unless they are expressly excluded, while the rest remained as before applicable only when they are expressly included. The existing law permits in explicit terms the application of the provisions of sections 5 and 12 of the Limitation Act to appeals and applications under the Burma Insolvency Act.

In *Jhan Bahadur Singh v. The Bailiff of the District Court of Toungoo* (1) it was held that the Insolvency

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(1) [1927] I.L.R. 5 Ran. 384.



Acts were intended to be complete Codes and to prescribe their own periods of limitation and that the Limitation Act does not apply. That case was concerning a matter regarding which no period of limitation was prescribed by the Provincial Insolvency Act, namely, the presentation of applications by creditors to be brought on the schedule of creditors. Therefore, the considerations which led the learned Judges to pronounce that proposition are quite inapplicable to the present case. We have further to consider whether the first respondent's application is one of the proceedings falling within the ambit of section 78 (1) ; in other words, whether the application is either an appeal or an application under the Act. Appeals are specifically provided for in Part VI of the Act consisting of only section 75 which read with Schedule 'I' contains all the matters appealable. Sub-section (4) of section 75 prescribes the periods of limitation for appeals only. Section 68 enables a person aggrieved by any act or decision of the receiver to apply to the Court with a view to obtaining reversal, alteration or modification of the act or decision complained of. By the marginal note the section is styled "Appeal to Court against Receiver". Here the word "appeal" is clearly not used in the same sense as an appeal from a Court to a higher Court because the receiver is not a Court, being merely an officer thereof. The proviso to the section runs :

"Provided that no application under this section shall be entertained after the expiration of twenty-one days from the date of the Act or decision complained of."

Therefore, what the section obviously intended to provide for are applications against the acts or decisions of the receiver. Section 78 (1) mentions appeals as well as applications. It is manifest,

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therefore, that section 78 (1) covers applications under section 68 for which a period of limitation is prescribed by the section itself as much as appeals under section 75 which itself in sub-section (4) prescribes the periods of limitation for appeals. Care must, of course, be taken to distinguish the period of the kind mentioned in section 9 (1) (c) from those mentioned in the proviso to section 68 and in section 75 (4) because the period of the first mentioned kind is not the period of limitation but constitutes part and parcel of the necessary legal qualification of a petitioning-creditor to present a valid petition to adjudicate a creditor.

The analogy drawn from sections 86, 101 and 90 (5) of the Presidency-Towns Insolvency Act (1909)—now the Rangoon Insolvency Act—gives further support to the view that section 5 of the Limitation Act is applicable to an application under section 68 of the Burma Insolvency Act because the period of limitation of twenty-one days fixed by section 101 for an appeal from any act or decision of the Official Assignee (section 86), or from an order made by an officer of the Court empowered under section 6 may be extended by the Court under section 90 (5).

The correctness of the procedure adopted by the learned District Judge in dealing with the matter under section 5 of the Limitation Act has been assailed on behalf of the appellant on the strength of the observations made in the judgment of the Privy Council in *Krishnasami Panikondar v. Ramasami Chettiar* (1). Their Lordships condemned the practice of admitting appeals subject to objections at the

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(1) (1917) I.L.R. 41 Mad. 412.

time, of the hearing pointing but that while that practice might have had the sanction of usage it was manifestly open to grave objection, and observed :

"It may, as in this case, lead to a needless expenditure of money and an unprofitable waste of time, and thus create elements of considerable embarrassment when the Court comes to decide on the question of delay. Their Lordships therefore desire to impress on the Courts in India the urgent expediency of adopting in place of this practice a procedure which will secure at the stage of admission the final determination (after due notice to all parties) of any question of limitation affecting the competence of the appeal."

In this case there was no formal application for extension of the period of limitation under section 5 of the Limitation Act. The affidavit of the applicant's agent dated the 27th July 1939 was annexed directly to the application under section 68 of the Burma Insolvency Act. The matter concerning section 5 of the Limitation Act was not dealt with or disposed of until the hearing of the main application. Thus, the method adopted by the District Court in dealing with the matter under section 5 of the Limitation Act has been that condemned by their Lordships of the Privy Council ; but there is nothing whatever to show that the incorrect method has led to failure of justice or has otherwise invalidated the proceeding. This ground is therefore insufficient *per se* to affect the validity of the finding of the District Court that there was sufficient cause for not making the application under section 68 within the period fixed by that section.

[Upon the facts and circumstances of the case his Lordship held that no sufficient cause had been shown for the delay.]

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In *Brij Indar Singh v. Kanshi Ram* (1) their Lordships of the Privy Council ruled that for the exercise of the judicial discretion allowed by section 5 of the Limitation Act, 1908, to admit for "sufficient cause" an appeal which would be otherwise time-barred as being out of time, the true guide is whether the appellant has acted with reasonable diligence in the prosecution of his appeal; and he ought to be deemed to have so acted where after deducting the time spent in prosecuting with due diligence a proper application for review of judgment, the period between the date of the decree appealed from and the date of presenting the appeal does not exceed the period prescribed for preferring an appeal. Applying the principle enunciated above to the facts of the present case, the first respondent must be considered to have failed to have acted with reasonable diligence inasmuch as she allowed about two months to elapse from the date on which she had, or could, with due diligence, have had knowledge of the sales which are sought to be set aside. In these circumstances her application under section 68 of the Limitation Act ought not to have been entertained but should have been dismissed by the District Court as having been presented without sufficient cause after the expiry of the period mentioned in the proviso to that section.

The appeal is allowed and the order of the District Court dated the 28th January 1941 is hereby set aside with costs in both Courts in favour only of the appellant payable by the first respondent, advocate's fee in this Court five gold mohurs.

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(1) (1917) I.L.R. 45 Cal. 94.



SARPE, J.—The point of law which arises in this case can conveniently be stated in the form of the following question: May an application under section 68 of the Burma Insolvency Act be admitted after the period of twenty-one days prescribed by the proviso to that section, when the applicant satisfies the Court that he had sufficient cause for not making the application within such period? To my mind the question is capable of being answered quite shortly, by pointing to sub-section (1) of section 78 of the Burma Insolvency Act. That sub-section provides, *inter alia*, that the provisions of section 5 of the Limitation Act shall apply to applications under the Burma Insolvency Act. An application under section 68 of the Burma Insolvency Act is necessarily an application under that Act, while section 5 of the Limitation Act permits of the extension of the period of limitation prescribed for any application to which section 5 may be made applicable, if sufficient cause is shown.

My Lord has just referred to the decision of a Bench of this Court in the case of *Jhan Bahadur Singh v. The Bailiff of the District Court of Toungoo* (1) in which, in the course of his judgment, Heald J. expressed the opinion that the Insolvency Acts "were intended to be complete Codes of the Insolvency law applicable to the areas to which they applied, and to prescribe their own periods of limitation." With all respect to that learned Judge, I am unable to share that opinion. My Lord has just said that the considerations which led to the pronouncement of that proposition are quite inapplicable to the present case. I only desire,

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therefore, to point out that in the case of *Ma Than May v. The Bailiff of the Township Court of Kyaunggôn* (1) Page C.J. said that, as then advised, he would not be prepared to accept the view expressed by Heald J. in *Jhan Bahadur Singh's* case (2). In my opinion section 5 of the Limitation Act does apply to an application under section 68 of the Burma Insolvency Act, and the answer to the question which I stated at the outset of this judgment must therefore be answered in the affirmative.

Upon the question of fact which now arises, I have nothing to add to what my Lord has said on the point. I do not think that the first respondent showed sufficient cause for not preferring the application within the period of limitation prescribed therefor by the proviso to section 68 of the Burma Insolvency Act.

I accordingly agree that this appeal must be allowed, and that the order of the District Court must be set aside. I agree also in the order for costs proposed by my Lord.

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(1) [1931] I.L.R. 9 Ran. 150, 151. (2) [1927] I.L.R. 5 Ran. 384.

## APPELLATE CIVIL.

*Before Mr. Justice Ba U and Mr. Justice Sharpe.*

HASSAN JEEWA & CO. v. U AYE MAUNG.\*

, 1946

Nov. 14.

*Rent raised during tenancy—Salami—Transfer of Property Act, s. 105.*

*Held:* Raising the rent during the continuance of the tenancy by way of "Salami" would not render the transaction illegal.

Demand of payment of a "Salami" plus payment of rent, at the time of the lease, is perfectly within the rights of the owner in view of section 105 of the Transfer of Property Act.

*Horrocks* for the appellants.

*Foucar* for the respondent.

BA U, J.—This appeal arises out of a suit filed by the respondent for ejectment of the appellant from the ground and first floors of his house, Nos. 108—112, Edward Street, Rangoon. The appellant is a tenant of the respondent, occupying the aforesaid floors on payment of Rs. 255 a month as rent. On the 10th June, 1946, the respondent sent a written notice asking the appellant to quit, vacate and deliver up possession of the said premises by the 30th June, 1946. The appellant refused to comply with the request, with the result that the present suit was instituted.

The pleas taken in defence are that in or about the first week of June, 1946, the plaintiff-respondent's agent, at the request and/or with the consent, knowledge and approval of the plaintiff-respondent, attempted to extort Rs. 15,000 from

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\* Special Civil 1st Appeal No. 14 of 1946 against the decree of the Chief Judge of the Rangoon City Civil Court in Civil Regular No. 6 of 1946



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the defendant-appellant by way of "salami", failing which the defendant-appellant would not be allowed to continue to live in occupation of the above-mentioned premises. The defendant-appellant refused to pay the amount demanded and consequently the notice to quit was served on him. The defendant-appellant therefore contended that the notice to quit under the circumstances set out above was illegal and invalid.

These pleas did not find favour with the learned Judge of the trial Court and the suit was decreed, as prayed, with costs. Hence this appeal.

In support of the appeal the learned counsel for the appellant submits that the demand for payment of Rs. 15,000 as "salami" amounted to extortion in that if the demand was not complied with the tenancy would be determined and that therefore the learned trial Judge should have dismissed the suit of the plaintiff-respondent on the ground that the plaintiff's cause of action was founded upon a crime and/or upon an act "the commission of which is contrary to public policy". In support of this submission the learned counsel cited the case of *Scott v. Brown, Doering, McNab & Co.* (1). The head note of that case reads:

"Held, that the action was based upon an illegal contract, and could not be maintained."

With due respect, the case cited by the learned counsel for the defendant-appellant has, in my opinion, no bearing upon the point in issue in the present case. The principle, as laid down in that case, is the same as the one laid down in section 23 of the Contract Act. If the facts of that case

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(1) (1892) 2 Q.B. 724.

were similar to the facts of the present case, I would certainly hold that the suit does not lie in view of section 23 of the Contract Act. But the facts of the present case are entirely different. Here, an owner leased his premises to a tenant on payment of a certain rent. At the time of the lease, if the owner had demanded the payment of a "salami" *plus* payment of the rent, he would be perfectly within his rights in view of section 105 of the Transfer of Property Act. Because the owner raised the rent during the continuance of the tenancy by way of "salami" it would not, in my opinion, render the transaction illegal. The question asked by my learned Brother Sharpe J., if I may say so with respect, put the legal position of the parties in a true perspective. The question was this: If a landlord asked a tenant to quit, vacate and deliver up possession of his premises by serving him with a notice in compliance with the terms of section 106 of the Transfer of Property Act and the tenant left, and if, on the following day, the landlord told the tenant that he could re-occupy the premises on payment of Rs. 15,000 as "salami" and the tenant did so, would the transaction be void and illegal? No satisfactory answer was given. In principle the case as illustrated by my learned Brother differs in no way from the present case.

For these reasons I would dismiss the appeal with costs.

I may note that I do not refer to the Urban Rent Control Act, 1946, as it does not apply to the present case.

SHARPE, J.—I agree.

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## APPELLATE CIVIL.

*Before Mr. Justice Ba U and Mr. Justice Sharpe.*1946  
Nov. 19.

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v.

MRS. JANNIE MANOOK AND OTHERS.\*

*Purpose of Custodian of Moveable Property Act—Suit for bare declaration under section 18 of Custodian of Moveable Property Act to set aside the decision of Custodian—Wrongly valued in trial Court—Amendment of valuation for the purpose of appeal under section 24 (1) of Rangoon City Civil Court Act.*

*Held* : Custodian of Moveable Property Act (X of 1945) was passed to protect the position of person who had to leave Burma hurriedly from the invading Japanese army.

In a suit for declaration under section 18 of Custodian of Moveable Property Act, 1945, the plaintiff valued the suit for jurisdiction at Rs. 1,000 though the admitted value of the properties concerned was Rs. 2,500 and court-fees of the value of Rs. 10 was paid under section 24 (1) of Rangoon City Civil Court Act, an appeal will lie from every decree when the amount or value of the subject matter of the suit exceeds one thousand rupees. The plaintiff-appellant preferred an appeal against the decree of City Civil Court, valuing the same at Rs. 2,500. On or objection as to the competency of the appeal.

*Held* : The amount or value of the subject matter of the suit is to be a certain minimum amount and not necessarily the value which a party has at an earlier stage put. As there was no loss of revenue, to the State, the plaintiff-appellant may put correct valuation and the appeal was held to be competent.

*Foucar* for the appellant.

*Horrocks* for the respondents.

SHARPE, J.—In the early days of 1942 a large number of people, then residing in Rangoon and other parts of Burma, hurriedly left their homes and sought refuge in India and elsewhere from the

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\* Special Civil 1st Appeal No. 1 of 1946 against the decree of the Chief Judge of Rangoon City Civil Court in Civil Regular Suit No. 146 of 1946.



invading Japanese army. Such persons were more concerned to escape with their own personal freedom, and indeed with their lives, rather than consider what they had better do with their personal belongings which they could not take away with them. Thus, much moveable property was left behind in Rangoon by its owners at the time of which I am speaking. To protect the position of such persons there was passed, after the liberation of Burma by British troops, the Custodian of Moveable Property Act, 1945. Section 3 of that Act provides that,

"Where owing to circumstances arising out of the war an owner of moveable property relinquished possession thereof within British Burma, it shall be presumed, until the contrary is proved, that he has continued to be the owner of such property and that he has had no intention of abandoning the same or any rights thereto."

The present case with which I am now dealing is concerned with certain articles of furniture (the most valuable individual article amongst them being a piano) which—so the first two respondents before us say—were left behind by them when they sought refuge in India in 1942. At the beginning of that year Mr. and Mrs. Manook (the two respondents whom I have just mentioned) were living in a house in Boundary Road, Rangoon. Owing to the Japanese bombing of Rangoon about that time they decided to leave their house in Boundary Road, and some of the furniture from their Boundary Road house was taken to No. 270 Prome Road, Rangoon, where Daw Pu, who is Mrs. Manook's mother, was then living. Other articles of furniture from the Boundary Road house were taken to Kokine. The furniture which went to No. 270

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Prome Road from the Boundary Road house was similar to the furniture which forms the subject of the present suit, including the piano. Mrs. Manook says that it is her property. Mr. and Mrs. Manook went up to Mandalay, and so did Daw Pu who had decided that it was best for her to leave No. 270 Prome Road owing to the advance of the Japanese army. Daw Pu left behind in No. 270 Prome Road her own furniture as well as the articles which Mr. and Mrs. Manook had taken there from the Boundary Road house.

As the tide of war rolled northwards through Burma, Mr. and Mrs. Manook decided to make for India, but Daw Pu decided to stay in Burma. One of the attractions for both Mr. and Mrs. Manook and Daw Pu in going to Mandalay had been that Daw Pu's daughter (Mr. Manook's sister) was living in Mandalay with her husband Mr. Redmond. When Mr. and Mrs. Manook decided to trek to India Mr. and Mrs. Redmond decided to stay in Burma with Daw Pu. Mr. and Mrs. Manook safely reached India while Daw Pu and Mr. and Mrs. Redmond took shelter in a village near Mandalay for some months. On the 5th July 1942 Daw Pu returned to No. 270 Prome Road accompanied by Mr. and Mrs. Redmond, and apparently the three of them continued to live there for sometime.

With the opening of the year 1943 the Allies commenced to bomb Rangoon heavily.\* Mr. Majid, the plaintiff in the present suit, was then living with his wife in a flat in Sule Pagoda Road, Rangoon, and in February 1943 they were bombed out of that flat. Mrs. Majid was Mr. Redmond's sister and so, in that way, was connected with Daw Pu and her daughter. Mr. and Mrs. Majid



on being bombed out as I have just mentioned, went and lived in the lower flat at No. 270 Prome Road, which was the building in which Mr. Majid's brother-in-law and his brother-in-law's mother-in-law were then living.

This preliminary history brings us to the crucial point in this case, which is the question whether Mr. Majid then partly furnished this lower flat at No. 270 Prome Road by being lent the furniture which Mrs. Manook had had transferred there from the Boundary Road house early in 1942 or by purchasing that furniture from—as Mr. Majid says he did—Mrs. Redmond who, was, according to Mr. Majid's own case, the true owner of the furniture and fully entitled to sell it to him. Mr. Majid says he bought it from Mrs. Redmond for Rs. 3,000, which he paid over to her after borrowing the whole of that sum from a friend of his, of the name of San Dun, a Lecturer at University College, Rangoon.

On the 22nd November, 1945, Mr. and Mrs. Manook returned from India to Rangoon and stayed at first in Brooking Street. By this time Daw Pu was dead. Early in 1944 there had been a serious quarrel between Daw Pu and Mr. and Mrs. Redmond on the one hand and Mr. and Mrs. Majid on the other. On their return to Rangoon Mr. and Mrs. Manook went to see Mr. and Mrs. Redmond, but did not call on Mr. and Mrs. Majid. Mrs. Manook saw the furniture which is the subject of the present dispute at No. 270 Prome Road after she came back from India, and she promptly laid claim to it alleging that it was the same furniture which had been taken to No. 270 Prome Road in the early days of 1942 from the Boundary Road house and that it was her

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property. Her application to the Custodian of Property for the return of this furniture was decided in her favour, and so Mr. Majid came to file the suit with which we are now concerned. He made not only Mr. and Mrs. Manook defendants but also Mrs. Redmond, and against all three of them he claimed a declaration that this furniture which Mrs. Manook admittedly found at No. 270 Prome Road on her return from India was his (Mr. Majid's).

The learned Chief Judge of the Rangoon City Civil Court came to the same conclusion as the Custodian of Property and dismissed Mr. Majid's suit with costs; and Mr. Majid has now appealed to this Court.

A preliminary objection to our entertaining this appeal has been raised on behalf of the respondents who were the three defendants in the Court below. As upon the merits of the case we think that this appeal must be dismissed, it is unnecessary for me to go into the preliminary objection in as much detail as otherwise I might have done. We think that the preliminary objection cannot be sustained and I will dispose of that point straight away.

Under sub-section (1) of section 24 of the Rangoon City Civil Court Act, as it is now called,

"An appeal shall lie to the High Court from every decree of the Court" (that is to say, from every decree of the Rangoon City Civil Court) "when the amount or value of the subject matter of the suit exceeds one thousand rupees."

Mr. Horrocks on behalf of the respondents has drawn our attention to the fact that in paragraph 8 of the plaint filed in the Court below it was stated that the suit was valued at Rs. 1,000 for jurisdiction and court-fees. By doing this—says

Mr. Horrocks—the appellant put it out of his own power to appeal to this Court in the event of a decision adverse to him being reached in the trial Court. It is conceded by both sides that the value of the subject matter of the present suit, that is to say the value of this furniture including the piano, is not less than Rs. 2,500, and so Mr. Foucar on behalf of the appellant says that an appeal does lie to this Court notwithstanding the fact that his client originally valued the suit at only Rs. 1,000 for jurisdiction and court-fees. Mr. Foucar points out to us that the suit was for a bare declaration and that therefore a court-fee stamp of ten rupees would have been sufficient, however great the value of the furniture about which I have been speaking. There has been no loss of revenue in this matter. The wording of section 24 of the Rangoon City Civil Court Act is similar to the wording of section 110 of the Code of Civil Procedure, which is the section dealing with appeals to His Majesty in Council, where “the amount or value of the subject matter of the suit” is to be a certain minimum amount. There are many cases, to which our attention has been called—one at least of them, a decision of the Judicial Committee of the Privy Council itself,—which show that, so far as section 110 is concerned, it is not necessarily the value which the party has at some earlier stage of the proceedings set upon his suit or appeal, which matters but the real value of the subject matter of the suit: see *Rachappa Subrao v. Shiddappa Venkatrao* (1), from which it appears that, if the requisite revenue is secured for the benefit of the State in the matter of the court-fee paid, it is

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not justifiable to assist a respondent to sustain a technical objection of the kind of which I am speaking. In the appeal with which we are now dealing there has been no loss to the revenue of court-fees and it is admitted that the value of the subject matter of the present suit exceeds one thousand rupees. We therefore think that an appeal lies to this Court under section 24, sub-section (1), of the Rangoon City Civil Court Act, and that Mr. Horrocks' preliminary objection to our entertaining this appeal must be overruled.

[On facts the learned Judge agreed with the finding of the trial Court and dismissed the appeal.]

BA U, J.—I agree.



## APPELATE CRIMINAL.

*Before Sir Ernest H. Goodman, Roberts, Kt., Chief Justice.*

## BA GYAN v. THE KING.\*

1946  
Oct. 2.

*Penal Code, s. 409—Authorized dealer selling goods to unauthorized purchaser.*

*Held:* It is not criminal breach of trust for an authorized dealer to sell the goods to an unauthorized purchaser even though he was only entitled to sell those goods to persons who were duly authorized to buy them, as the goods obtained from the officer-in-charge of the Distributing Point were his property.

*Choon Foun*g (Government Advocate) for the Crown.

ROBERTS, C.J.—The appellant, Ba Gyan, was convicted by the learned Special Judge, Mandalay, of an offence against section 409 of the Penal Code and sentenced to two years' rigorous imprisonment.

The position is that Ba Gyan was an authorized dealer of cotton piece-goods and similar articles in Mandalay. He was only entitled to sell the goods obtained from the officer-in-charge of the Distributing Point to persons who were duly authorized to buy them: this was the understanding upon which the goods were issued to him.

However, the appellant, on his own showing, made them over to a creditor who was not authorized to purchase from him.

Still, the goods were his property, although they were only issued to him on his giving an undertaking, which he has broken. He has not committed the criminal offence of breach of trust in respect of the property of another person

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\* Criminal Appeal No. 502 of 1946 against the order of U Maung Gale (2), Special Judge, Mandalay, passed in his Criminal Regular Trial No. 21 of 1946.

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entrusted to him, because these piece-goods were his own property. Consequently, his conviction cannot stand, and the appeal is allowed, the conviction and sentence quashed and, so far as this case is concerned, the appellant is directed to be set at liberty.

## APPELLATE CRIMINAL.

*Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice.*

## MAUNG TUN (HTUN) v. THE KING.\*

1946

Dec. 18.

*Penal Code, s. 412—Requisites—Dacoity—Five persons acting in concert—Statement that a shawl was "brought at the instance of police"—If admissible under section 60 of the Evidence Act—Possession of stolen property—No presumption in absence of guilty knowledge or recent possession.*

A person can be convicted under section 412 Penal Code if he received stolen articles from a person having reason to believe him to belong to a gang of dacoits or knew or had reason to believe that possession of the article had been transferred by dacoity. The offence of dacoity requires at least five persons acting in concert and in the absence of evidence to that effect, cannot be presumed.

A headman's evidence that a shawl (whose possession had been alleged to be transferred as a result of dacoity) was brought to him "at the instance of the police" is inadmissible under section 60 of the Evidence Act. The police officer who found the article is the proper witness to speak to such finding.

Unless there is some evidence of guilty knowledge or recent possession of stolen property no presumption can be made against the possessor.

*Chan Tun Aung* (Government Advocate) for the Crown.

ROBERTS, C.J.—The appellant was convicted of an offence under section 412 of the Penal Code by the learned Special Judge at Minbu and sentenced to one and a half years' rigorous imprisonment.

I regret to observe that the case was by no means well tried. The Special Judge remarked in his judgment that the first point for decision was whether there was a dacoity and said that on the evidence there was no doubt about the dacoity.

Dacoity cannot be committed by less than five persons acting in concert and there was no evidence

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\* Criminal Appeal No. 1516 of 1946 against the order of the Special Judge, Minbu, in Criminal Regular Trial No. 57 of 1946.



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at all as to the number of persons concerned in the robbery at Yinskay village. Maung Po Khant (P.W. 2) described the offence as a dacoity but said he only saw two dacoits and no others. The other prosecution witnesses, who were villagers Maung Mya (P.W. 4) and Maung Kywet (P.W. 5), did not see any dacoits at all. If Maung Po Khant had been asked why he described this as a dacoity, as he ought to have been asked, he might well have said that the robbers were numerous and he could hear several houses being attacked simultaneously with his own : however, he was not asked, and though it is more than probable that a dacoity on quite a large scale took place this was never proved in evidence.

The date of these incidents was April 4 of this year. The appellant was charged with having received stolen property, namely one shawl, knowing or having reason to believe that possession of the same had been transferred by the commission of dacoity. This shawl was seized from him nearly three months after the robbery. Maung Yan Shin (P.W. 3), the headman, held an identification parade of properties suspected of having been stolen and Maung Mya U (P.W. 4) identified as his property this shawl. The headman says that this was brought to him "at the instance of the Police" by Maung Tun. This was a very loose way of recording evidence. The police officer (if any) who found the shawl in appellant's possession should have been called as a witness. In strictness, when Maung Yan Shin says that the shawl was brought "at the instance of the Police" he has stated something inadmissible by reason of section 60 of the Evidence Act. The appellant was arrested on the 5th of July, three months after the robbery, and was tried with his brother Maung Nyi who was acquitted. Their father

Maung Ywa (P.W. 7) produced a towel to the police which Maung Nyi afterwards said was his own property, and the Special Judge thought this was probably true. Maung Ywa knows nothing about the shawl.

It is most unsatisfactory to base a conviction merely upon statements, shown to be untrue, of persons, who may be frightened when the time comes for them to make their defence. The appellant gave evidence and said he bought the shawl from an unknown person; in his grounds of appeal he says it was given him by one Thein Maung and he did not know that it was dacoited property. Maung Lu (P.W. 6) said that the two accused used to feed a man named Thein Maung who is an absconder, but he did not state what offence Thein Maung was alleged to have committed. Thein Maung was not described as a dacoit as well as an absconder until one of the defence witnesses was called; and even then this witness only said that the appellant knew Thein Maung was an absconder, and not that he knew he was a *dacoit*. Moreover, witnesses ought not to be asked what they themselves thought or what in their opinion some other person knew or had reason to believe.

The appellant could only be convicted under section 412 of the Penal Code in one of two ways. The first was, if it appeared clear to the Court beyond all reasonable doubt that the appellant received the shawl from Thein Maung having reason to believe that Thein Maung belonged to a gang of dacoits; as to this there is but the bare statement of one defence witness that Thein Maung was a dacoit. This witness was not asked how he knew this—much less how the appellant could know it. There is no proof that the appellant knew it.

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The second way in which the appellant could be convicted under section 412 was if it appeared clear to the Court beyond all reasonable doubt that the appellant knew or had reason to believe that possession of the shawl had been transferred through dacoity. As to this, there is some evidence that the possession was part of the proceeds of the theft, but none that it was part of the proceeds of a dacoity. Now, supposing the learned Special Judge had considered this case under section 411 and not 412, he would have had to consider whether the stolen property was found in the appellant's possession soon after the theft, before he (the Special Judge) even framed a charge under the section. In his judgment he expressly said that the possession was not recent. The theft was on April 4 and possession of a small and by no means uncommon article of clothing was not shown till nearly three months later. Having said this, the learned Special Judge allowed himself to make the very presumption which he ought not to have made, namely that the appellant (in the absence of any explanation on his part which may result in his favour) knew that the property had been stolen. The learned Special Judge seems to have thought that once stolen property has been recovered from a person, if the possession is recent he may be presumed to be a thief; and if it is not recent that he may be presumed to have known that it was stolen. This is very far from being the law and it is important that this should be fully realized. When a person is found in possession of property proved to have been stolen, there may of course be evidence from which the inference can be drawn that he knew it to have been stolen. Such evidence may relate to statements



made to him or statements made by him or to his conduct in relation to the property by way of concealment or otherwise. Apart from that a Court may make the presumption—which can always be rebutted by showing that its validity is doubtful—that property found in a person's possession recently after the commission of the theft was known by him to have been stolen. Unless there is some evidence of guilty knowledge or of recent possession no presumption against the possessor can be made. Where the possession is recent, the nature of the presumption to be made must necessarily vary in accordance with the circumstances. In the absence of clear evidence from which participation in the actual theft or dacoity can be inferred, the conviction should be for receiving only; and where the proceeds of the dacoity are found in possession shortly afterwards, even the fact of concealment—though it may help to prove that he knew the property was stolen—is not by itself proof that he knew of such dacoity.

On the learned Special Judge's own showing the appellant ought never to have been charged at all at the end of the case for the prosecution. Accordingly his appeal must be allowed, his conviction and sentence set aside, and he must be acquitted, and so far as this case is concerned forthwith set at liberty.

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## CIVIL REVISION.

*Before Mr. Justice Mosely.*1941  
Dec. 9.

P.R.M. PERIAKARUPPAN CHETTIAR

v.

A.Y.M.L.L. CHETTIAR AND ONE.\*

*Material irregularity—Finding without materials before Court—de bene esse examination—Civil Procedure Code, Order 26, Rule 7.*

*Held* : The Judge acted with material irregularity when there was no material whatever for him to come to his implied finding that the party knew that the witness was leaving the jurisdiction and that he should have applied for *de bene esse* examination.

*L.P.R. Chettiar Firm v. R. K. Bannerji*, 9 Ran. 71 ; *Kumar Sarat Kuman Ray v. Ram Chandra Chatterjee*, 35 C.L.J. 78 ; *A.R.P.R. Viswanathan Chetty v. M.N.M. Somasundaram Chetty*, 46 M.L.J. 131 ; *Nawab Saiyid Muhammad Akbar Ali Khan v. Herbert Francis*, 3 Pat. 863, referred to.

*P. K. Basu* for the applicant.

*Hay* for the respondent.

MOSELY, J.—The plaintiff-applicant in revision, P.R.M. Periakaruppan Chettiar, was the assignee of a mortgage executed by L.R.M.L.M. Narayanan Chettiar in favour of one M.P.R.V.R. Alagaraswamy Velar and obtained a final mortgage decree. The first respondent, A.K.M.L. Lakshmanan Chettiar obtained a simple money decree against the M.P.R.V.R. Firm and attached the immovable properties. The applicant asked that the mortgage decree be mentioned in the sale proclamation. The first respondent was allowed to challenge that decree in execution. The applicant wanted a commission to examine the original mortgagee but his application for a commission to examine him was refused. The Judge found that

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\* Civil Revision No. 195 of 1941 against the order of the Subdivisional Court of Wakema at Myawngmya in Civil Regular Suit No. 17 of 1940.

the consideration of the mortgage had not been proved, and the applicant actually filed the present declaratory suit for declaration that the properties were subject to the mortgage.

The applicant made the original mortgagee a party. The other defendants objected to this,—I do not know what concern it was of theirs—, and the Judge held that he was not a necessary party and ordered him to be struck off. Whether he was a proper party or not was not considered.

This suit which was instituted on the 14th December 1940 was a good deal delayed, and when the plaintiff-applicant was about to file his witness list he said he had learnt that the original mortgagee had left for India. The suit was filed at Myaungmya and the original mortgagee lives at Moulmeingyun. The applicant applied for a commission to examine the original mortgagee. The defendants contended that it should not be granted.

The witness had left for India. He was outside the control of the Court. The Judge said that no satisfactory explanation had been given by the plaintiff why the witness should not have been examined *de bene esse* before he left for Madras. It was said that it was desirable to examine him in open Court so that the Court could note his demeanour, and that the defendants would be prejudiced if a commission was issued.

There was no material whatever for the Judge to come to his implied finding that the plaintiff knew that the witness was leaving for Madras and that he should have applied for *de bene esse* examination.

It appears to me that the Judge acted with material irregularity. Even the examination of defendants on commission is sometimes granted. I have

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no doubt that this application for revision against the order under Order 26, Rule 1, will lie in extreme cases. See *L.P.R. Chettiar Firm v. R. K. Bannerji* (1). See also *Kumar Sarat Kuman Ray v. Ram Chandra Chatterjee* (2), *A.R.P.R. Viswanathan Chetty v. M.N.M. Somasundaram Chetty* (3) and *Nawab Saiyid Muhammad Akbar Ali Khan v. Herbert Francis* (4). A decision of a Bench of this Court said to be to the opposite effect is quoted, but I will not refer to it as it concerns merely an application to extend the time allowed for a commission.

All the parties are Chettiars and I do not think that the defendants will be materially prejudiced by the examination of this witness on commission in Madras. I consider that there was no sufficient reason to differ from the ordinary rule allowing the issue of a commission.

The order of the trial Court will be reversed and it will be directed that the commission will issue to the witness. The respondents must pay the costs of this application, advocates' fee two gold mohurs.

(1) 9 Ran. 71.  
 (2) 35 C.L.J. 78.

(3) 46 M.L.J. 131.  
 (4) 3 Pat. 863

## ORIGINAL CIVIL.

v  
Before Mr. Justice Blagden.

IN THE MATTER OF A. P. JOSEPH, INSOLVENT.\*

1941

Aug. 22.

*Insolvency practice—Death of person before his adjudication—Estate administered by Court—Payment of funeral expenses—No provision in case of insolvent dying after adjudication—Court's discretion to order payment of funeral expenses—Inquiries and account—Life insurance policy of deceased—Rangoon Insolvency Act, ss. 108, 109.*

If a man dies before he is adjudicated insolvent and his estate is administered by the Insolvency Court, his funeral expenses are payable out of the estate in priority to all other debts. But there is no statutory provision in the Rangoon Insolvency Act for payment of the funeral expenses of a person who has been adjudged insolvent before his death. As a matter of practice and fairness, the Court may order such expenses to be paid out of the estate having regard to all the circumstances of the case.

*In re Walter*, (1929) 1 Ch.D. 647, referred to.

Directions as to account, inquiries, payment, etc., given in this case as regards the proceeds of a policy on the life of a deceased insolvent vested in the Official Assignee.

*H. Basu* for the applicant.

*Darwood* for the creditors.

BLAGDEN, J.—This is a rather unusual application and the question involved appears to me of some general importance. The material facts are as follows: One A. P. Joseph, whom I shall call "the deceased", was adjudicated insolvent in this Court on the 8th May 1935. He never obtained his discharge and he died on the 21st June this year. His creditors were Rs. 24,000 odd secured and Rs. 32,000 unsecured. The secured creditors have however been paid in full and dividends amounting to five annas in the rupee have been paid to the unsecured creditors. Prior to the 8th May 1935, at

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\* Insolvency Case No. 109 of 1935.

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the instance of a secured creditor, and for the purpose of supporting that creditor's security, the deceased had effected a policy on his life for Rs. 10,000. He paid the premiums, or somebody did on his behalf, down to the commencement of the insolvency and after the insolvency the secured creditor concerned was able to realize sixteen annas in the rupee out of the other securities that he held and, accordingly, reassigned the policy to the Official Assignee.

The policy was not therefore, properly speaking, after-acquired property of the deceased. Subject to the mortgage, it was the deceased's at the commencement of the insolvency and automatically it vested in the Official Assignee at that date. On its assignment to him by the mortgagee he was in a position to realize its surrender value. In fact he did not do so, but he kept the policy on foot, as a result of which and of the death of the deceased there is now due to him by the insurers a sum of Rs. 10,000.

The widow of the deceased now petitions me that I give a direction to the Official Assignee to pay a sum of Rs. 850 out of the creditors' money for funeral and connected expenses. At first blush that seems a most extraordinary thing to ask for, but it is not so extraordinary as it seems. Under section 109 sub-section (3) of our Insolvency Act the funeral expenses of a deceased debtor whose estate is being administered under section 108 are to be deemed preferential debts and to be payable in full out of the debtor's estate in priority to all other debts. It seems an extraordinary thing that if man dies before he is adjudicated insolvent his funeral expenses rank before his ordinary debts, whereas if he is adjudged insolvent



before, he dies the entire funeral expenses should have to be paid by his relatives. But however extraordinary it may be I should hesitate to incorporate into the Act something that is not there, for the purpose of relieving the necessities of the insolvent's surviving relatives, if it were not for the fact that a somewhat similar application under the English Act was made in *In re Walter* (1) before Tomlin J. as he then was; he allowed the representatives of the deceased insolvent in that case their reasonable funeral expenses. There is, however, this important difference between the facts here and those in *In re Walter* (1) that the money out of which Tomlin J. directed payment to be made were after-acquired property. The bankrupt had accumulated sums in the bank out of his personal earnings since the bankruptcy proceedings. He had incurred certain debts in the ordinary course of living and he then died and as a result the executors incurred funeral expenses. Undoubtedly Tomlin J. was influenced by the section corresponding to section 109 (3) of our Act, but also, I think, he had in his mind the fact that as the surplus of the debtor's savings, which, in turn, came out of his earnings, was going to the creditors, it was at least reasonable that the Official Assignee should pay the debts that the debtor had incurred in the ordinary course of living (for if he had not lived he could not have earned the money or saved it) and his funeral expenses (because, I suppose, if he had not died he might have spent all his savings).

This case is very different and it is quite clear that I cannot make precisely the same order that Tomlin J. made; for one thing I do not feel

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(1) (1929) 1 Ch.D. 647.

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competent to decide on affidavit whether Rs. 850 is a reasonable sum to spend on the funeral expenses, of a gentleman who is insolvent, in the Jewish Community in Rangoon, which I myself am not a member of and know very little about. Another thing, of course, is that I have to bear in mind that the policy here was kept on foot by the Official Assignee and it would be a monstrous thing if the funeral expenses had to be paid in priority to the return to the Official Assignee of the premiums he has expended, with interest on them at a reasonable rate.

I have even some doubt about whether I ought to make any order in the applicant's favour having regard to the fact that there are no statutory provisions dealing with the matter and that the application is made to me under what is sometimes, misleadingly, called the Common Law of Insolvency. It is misleading because insolvency, after all, is a pure creature of statute. But none the less there have grown up around the Act a certain number of rules of practice, one of which is that the Official Assignee as an officer of the Court is bound to act with the utmost propriety and fairness. On the whole I think it is fair to the relatives (as the estate has benefited by the difference between the surrender value of the policy on the date that it was assigned to the Official Assignee *plus* the premiums that have been subsequently paid on it and the Rs. 10,000 which was received in consequence of the death) that a reasonable sum out of that difference might be allowed towards funeral expenses. I am aware that this is extending the principle laid down in *In re Walter* (1) but I think that Tomlin J. would have come to the same conclusion on these facts had they been before him.

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(1) (1929) Ch.D. 647.

I accordingly propose to order *first* of all an account of the premiums paid by the Official Assignee for the purpose of keeping up the policy in question with interest on each of them at Court rate down to the foot of the account; *secondly*, an inquiry, unless the parties can agree, as to what was the surrender value of the policy at the date of its assignment to the Official Assignee by the creditor to whom it was mortgaged; *thirdly*, an inquiry as to what sums have been spent and what liabilities incurred by the applicant for funeral expenses of the deceased and what sums and liabilities it was reasonable for her to expend or incur having regard to the position of the deceased, including the fact of his insolvency: *fourthly*, I propose to direct the Official Assignee:—to deduct from the policy moneys the aggregate sums ascertained by the account and the first inquiry: out of the balance of the policy moneys to pay his own costs in these proceedings, the costs of the opposing creditors, and, if the lesser of the two amounts ascertained by the second inquiry is Rs. 100 or more, the costs of the applicant; and, finally, out of the balance (in so far as it shall suffice), of the policy moneys to pay the lesser of the two sums ascertained by the second of the foregoing inquiries, that is to say the amount expended or incurred or the amount which it would be reasonable to pay, whichever be the less. The whole of this order, so far as it confers any benefit on the applicant, is conditional on her filling in all necessary forms and doing whatever else may be reasonably required of her by the Official Assignee for the purpose of enabling him to obtain payment of the policy moneys from the insurers.

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## CRIMINAL REVISION.

*Before Mr. Justice Thein Maung.*S. M. BASHIF *v.* THE KING.\*

1946

Aug. 6. Cognizance—Code of Criminal Procedure, ss. 190, 191—Sanction for Prosecution (War Time Offences) Act, 1946, s. 2.

*Held* : Taking cognizance does not involve any formal action or action of any kind, but occurs as soon as a magistrate, as such, applies his mind to the suspected commission of an offence.

*Baldeo Prasad v. K.E.*, (1933) I.L.R. 12 Pat. 758 ; *Emperor v. Sourindra Mohan Chuckerbutty*, (1910) I.L.R. 37 Cal. 412, followed.

*Held* : Sanction for Prosecution (War Time Offences) Act has nothing to do with offences of which the Courts have already taken cognizance before it came into force and there is nothing in the Act to prevent the Courts from proceeding with their trial.

*Kyaw Myint* for the applicant.

THEIN MAUNG, J.—With reference to the contention that there are no materials even now before the trial Court to enable it to take cognizance of the offences alleged against the petitioner, I have already held in Criminal Revision No. 54B of 1946 that there were materials on which the trial Court could take cognizance of the offences.

With reference to the contention that "the Court has in law even now not yet taken cognizance", the learned Special Judge has stated that he had already taken cognizance under section 190 (b) of the Criminal Procedure Code on the 18th July 1946 in the light of my order in the said Criminal Revision. As has been pointed out in *Baldeo Prasad v. King-Emperor* (1)—

"The expression 'to take cognizance' has not been defined in the Criminal Procedure Code, and it is difficult to ascertain

\* Criminal Revision No. 87B of 1946 praying that the proceedings in Criminal Regular Trial No. 14 of 1946 of the Court of U Tin Toon, Special Judge, Rangoon, may be quashed and that the applicant be discharged.

(1) (1933) I.L.R. 12 Pat. 758.

at what precise stage of a case cognizance is said to be taken." However, "taking cognizance does not involve any formal action, or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence." [See *Emperor v. Sourindra Mohan Chuckerbutty* (1).]

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It has also been pointed out in *Baldeo Prasad v. King-Emperor* (2)—

"Taking cognizance under section 190 (1) is a very particular, technical matter confined to the initiation of proceedings. From the terms of clauses (a) and (b) of the section it is clear that cognizance is taken under these clauses before the taking of any evidence, and section 191 shows that cognizance is taken under clause (c) also before any evidence is taken. Even apart from the wording of sections 190 (1) and 191, proceedings laid down in the Code leaves no room for taking cognizance under section 190 (1) after what is described in the heading of Chapter XVII as 'Of the commencement of proceedings before Magistrates'."

So I held that the learned Special Judge did take cognizance of the offences when he, after reading a copy of my order of that date in the said Criminal Revision, fixed a date for the trial of the petitioner, even if he could not or had not done so before.

The learned counsel for the petitioner has urged that the trial Court must take cognizance not in the proceedings pending but in fresh proceedings. However, he is unable to quote any authority in support of his contention, and I am of the opinion that the accused-petitioner has not in any way been prejudiced by cognizance having been taken in the same proceedings.

With reference to the contention that the "Sanction for Prosecution (War Time Offences)

(1) (1910) I.L.R. 37 Cal. 412.

(2) (1933) I.L.R. 12 Pat. 758.

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Act, 1946 " debars the trial Court from proceeding with the case even if it has taken cognizance before the passing of the Act; I am very clearly of the opinion that it does not do so. The first paragraph of the Preamble to that Act reads :

" WHEREAS it is expedient that prosecutions in respect of criminal offences alleged to have been committed during the war between Great Britain and Japan shall not *now* be instituted without sanction."

Section 2 of the Act also provides

" . . . no Court shall take cognizance \* \* \* of any offence alleged to have been committed in British Burma between the eighth day of December, 1941, and the fifth day of May, 1945, \* \* without the prior sanction of the Governor in his discretion."

To my mind, it is quite clear from the wording of the preamble and section 2 that the intention is to prevent Courts from taking cognizance of the said offences after the Act came into force without the prior sanction of the Governor. The Act has nothing to do with offences of which the Courts have already taken cognizance before it came into force. Prosecutions in respect thereof have already been instituted and the Courts have already taken cognizance of them and there is nothing in the Act to prevent the Courts from proceeding with their trial.

The application is dismissed for the above reasons.



## CRIMINAL REVISION.

*Before Mr. Justice Pakenham-Walsh.*MA MI LAY *v.* THE KING.\*

1946

Oct. 30.

*Upper Burma Land and Revenue Regulation, 1899, s. 23 and Rules 68 and 69—State land—Village land—Bobabaing land—Burden of proof on prosecution.*

*Held:* All village lands need not necessarily be State lands, and that there was no reason why a person should not own *bobabaing* land in a village.

*Maung Kyauk Pu v. Maung Pu*, I.L.R. 3 Ran. 147, followed.

The prosecution must establish that it is State land.

*Tin Maung* (Government Advocate) for the Crown.

PAKENHAM-WALSH, J.—The Additional District Magistrate, Magwe District, Yenangyaung, recommends that the order of the Additional Magistrate of Chauk, passed in his Criminal Regular Trial No. 19 of 1946, directing Ma Mi Lay to pay a fine of Rs. 30 or, in default, to suffer one week's rigorous imprisonment, under Rule 69 (2) of the rules made under the Upper Burma Land and Revenue Regulation, 1899, be set aside. I take it that he also intends to recommend that the conviction be set aside.

Ma Mi Lay was prosecuted for failure to comply with a requisition made in a notice issued under Rule 69 (1) of those rules. It was alleged that she was in unauthorized occupation of land at Ye-oh-zin-gyaung. The land to which Rule 69 refers is State land which is waste [see Rule 68 (1)]. It was not stated in the particulars of the offence

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\* Criminal Revision No. 118B of 1946 reviewing the order of U E Kwaw, Additional Magistrate (1) of Chauk, passed in his Criminal Regular Trial No. 19 of 1946.

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stated to the accused that the land was State land which is waste ; but it may be assumed that that was the case for the prosecution, as Rule 69 (2) was mentioned.

Ma Mi Lay, in response to the particulars of the offence stated, said that she did not occupy State land and that the site in question is her *bobabaing* land : she admitted that she had received a notice from the headman—though what kind of notice she does not say—and that she did not comply with it, because her land is *bobabaing* land : she maintained that she is not guilty.

The learned trial Magistrate held that it was proved that the land in question is village land which is at the disposal of Government and as such is State land, and that Ma Mi Lay failed to comply with the requisition made in the notice of ejectment. Consequently, he convicted her under Rule 69 (2).

Ma Mi Lay then made an application in revision to the Additional District Magistrate, who considered that it had not been proved that the land was State waste land as contemplated by Rule 68, and that the notice, which was issued to the applicant, instead of being a notice of ejectment from the land, was merely a notice issued under the signature of the headman, ordering the applicant to remove her building on the land. He is of opinion that that is not a notice within the meaning of Rule 69. Consequently, he has submitted the case to the High Court with the recommendation, which I have already mentioned.

In my opinion, the case can be decided on the point that the prosecution has not proved that the land is State land which is waste, within the meaning of Rules 68 and 69, and that for this reason the conviction and sentence must be set

aside. "State land" is defined in section 23 of the Upper Burma Land and Revenue Regulation and, so far as this case is concerned, the material portion of that definition is that which refers to land belonging to or at the disposal of the Government. According to U Ohn Maung, Township Magistrate (P.W. 1), the land is village land which is State land at the disposal of the Government. In cross-examination, however, this witness said: "The said land being a village land is included in the classification State Land". I think that he must mean that his reason for saying that the land is State land is because it is village land. That is not a correct conclusion, because in the case of *Maung Kyauk Pu v. Maung Pu* (1) it was held that all village lands need not necessarily be State lands, and that there was no reason why a person should not own *bobabaing* land in a village. Consequently, the Township Officer does not appear to have been justified in saying that because the land was village land it was State land. He has not given any other reason for saying that it is State land. It must be concluded that the prosecution has failed to establish that it is State land.

With regard to the question of the notice of ejectment, to which the learned Additional District Magistrate refers, I have not been able to find any written notice on the trial record. The learned Additional District Magistrate says that it was issued under the signature of the headman and did not mention anything about ejectment, but that it was an order to the applicant to remove her building on the land. I do not know to what document he refers: possibly he is referring to a document, not

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(1) 3 Ran. 147.



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admitted in evidence, which I find in the District Office Revenue Proceedings No. V-17 of 1946-47. If so, that document was a report by the headman in which he said that he had ordered Ma Mi Lay to dismantle her house. That document might have been made the basis of a question to the headman as to whether the notice, which he says he gave to Ma Mi Lay, was not a notice to dismantle her house and not to remove herself. Anyhow, whether a written notice is required and whether it must be in a particular form or not is not of importance, in view of my conclusion that it has not been proved that the land is State land which is waste.

I observe that Ma Mi Lay did not give evidence in her own behalf, and there is no indication on the record that she was informed about the position. There is nothing on the record to show that she was examined under section 342 of the Code of Criminal Procedure. It is not necessary to consider this aspect of the matter further, or the effect of the case of *King-Emperor v. Nga La Gyi* (1).

The conviction and sentence passed against Ma Mi Lay are set aside, and I direct that she be acquitted. The fine, which has been paid, will be refunded to her.

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(1) 9 Ran. 506.

## APPELLATE CRIMINAL.

*Before Mrs Justice E Maung.*

## TUN AUNG v. THE KING \*

1946

Dec. 5.

*Section 395, Penal Code—Abettor convicted of principal offence—109 Penal Code not mentioned in charge—Validity of conviction—Section 537, Cr.P.C.—Curable under—No failure of justice—Prosecution Case put under section 342, Cr.P.C.*

The appellant arranged for dacoity, got together the dacoits, sent them but did not accompany them. The dacoity was committed as planned and appellant received major share of the loot. The trial Court convicted him under section 395, Penal Code.

*Held:* Though the charge did not mention section 109, Penal Code, the appellant was liable to be punished as a principal offender, by operation of that section and the omission of section 109 is curable by section 537, Cr.P.C. especially as the whole prosecution case was put to him in his examination under section 342, Cr.P.C.

*Queen v. Chand Nur*, (1874) 11 Bom. H.C. 240; *Singaravelu Pillay v. Emperor*, 14 I.C. 203; *Khumman v. King-Emperor*, 7 Luck. 102 at 108; *Bhishhari Singh v. K.E.*, 13 Pat. 739; *Juanadacharan Ghatak v. Emperor* 57 C. 807; *Begu v. King-Emperor*, 52 I.A. 191; *Debiprasad Kalowar v. Emperor* 59 Cal. 1192 at 1195; *Emperor v. Mahabir Prasad*, 49 All. 120; *Syamo Maha Patro, In re*, 55 Mad. 903; *S. P. Ghosh v. King-Emperor*, 8 L.B.R. 274; *A. V. Joseph v. King-Emperor*, 3 Ran. 11 at 22—28; *Lala Ojha v. Q.E.*, 26 Cal 863; *Hari Lal v. King-Emperor*, 14 Pat. 225, considered.

*Tin Maung* (Government Advocate) for the Crown.

E MAUNG, J.—The appellant Tun Aung and eight others were arraigned before U Chit Khin, Special Judge, Moulmein, in his Criminal Regular Trial No. 60 of 1946. Eight of the accused were convicted and sentenced to different terms of imprisonment or whipping. The accused who was sentenced to whipping did not appeal. But the other accused, including the present appellant, have

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\* Criminal Appeal No. 992 of 1946 against the order of U Chit Khin, Special Judge, Moulmein, passed in his Criminal Regular Trial No. 60 of 1946.

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appealed to this Court in separate proceedings. In Criminal Appeal No. 994 of 1946 I have reduced the sentence passed on Win Shein, the appellant in that case, to the term of imprisonment already undergone and 20 lashes of whipping. The appeals of the other appellants have been summarily dismissed by Thein Maung J. in Criminal Appeals Nos. 988 to 991 and 993 of 1946. "

In admitting this appeal Thein Maung J. entered this note :

"Should he have been convicted as a principal offender?"

The appellant Tun Aung was charged in these terms :

"That you, on or about the 2nd day of March 1946 at Kyauktalon committed the dacoity at the house of Mutu an offence punishable under section 395 I.P.C. . . ."

The appellant entered upon his defence after which judgment was delivered, the relevant portion of the finding in the judgment being :

"I find the accused Tun Aung guilty of an offence punishable under section 395 I.P.C. . . ."

The facts have been very fully stated in the judgment of the learned Special Judge who has carefully analysed the evidence against the appellant as also his defence and I do not propose to recapitulate them. All that is necessary for me to say is that I am satisfied that early in the night of the 2nd of March, 1946, a dacoity was committed at the house of the complainant Mutu in Kyauktalon village and that this dacoity was planned and engineered by the appellant. The appellant made all arrangements for the commission of the dacoity,



got together the dacoits and sent them away on the task. He himself, however, being a marked man known to the authorities as a notorious bad character, did not leave his village as his absence would have been noticed. The dacoity was committed as planned by him and he received a major share of the loot.

The acts of the appellant, for which he should have been convicted, consist in the abetment of the dacoity which was committed on the night of the 2nd of March and not in the actual robbery by a party of five or more persons that night. The appellant is certainly not the principal offender in respect of the dacoity. Two questions then arise, namely, (i) whether the conviction by the trial Court under section 395 of the Penal Code is in accordance with law? and (ii) if that conviction is not legal, is it open to me, sitting in appeal, to alter the conviction to one under the proper section of the law?

If the matter had been one of first impression, I would not have hesitated in holding that the conviction by the trial Court is one which, at the worst, would be curable under and be cured by the provisions of section 537 of the Code of Criminal Procedure; but there are conflicting decisions on the two points that arise for consideration in this appeal and it is necessary to discuss these opinions before I give my own reason for the course which I propose taking in this appeal.

In *Queen v. Chand Nur* (1) the High Court of Bombay took the view that a person charged for murder may not be legally convicted for abetment of the murder. The learned Judges in that case said that when a man is accused of murder he

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(1) (1874) 11 Bom. H.C. 240.

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may not be conscious that he will have to meet an imputation of collateral circumstances constituting abetment of it which may be quite distinct from the circumstances constituting the murder itself. In *Singaravelu Pillay v. Emperor* (1) a conviction for abetment of theft when the accused was charged with theft was held to be wrong. In *Khumman v. King-Emperor* (2) the learned Judges said :

" Thus if the abetment preceded the commission of the principal offence, or involved the imputation of collateral circumstances constituting the abetment which were distinct from the circumstances constituting the actual offence, then on a charge of the principal offence, it would not be right to convict the accused person of abetment of that offence, because it could not be said that he had been given an opportunity to meet the facts which constituted the alleged abetment."

On the other hand, in *Bhikhari Singh v. King-Emperor* (3) Fazl Ali J., with the concurrence of James J., said:

" It is well settled that if a charge is framed for a substantive offence, a person may without any additional charge being framed be convicted of an attempt to commit that offence. He may similarly be convicted of abetment to commit that offence, though on this point conflicting views have been expressed in cases decided under the old Code."

In *Jnanadacharan Ghatak v. Emperor* (4) a Bench of the Calcutta High Court found support in the decision of their Lordships of the Privy Council in *Begu v. King-Emperor* (5) for the view that there is no universal rule against a person having been charged with a substantive offence being convicted

(1) 14 I.C. 203.

(2) 7 Luck. 102 at 108.

(3) 13 Pat. 739 at 733.

(4) 57 Cal. 807.

(5) 52 I.A. 191.

for abetment thereof. They quoted the following words of their Lordships of the Privy Council:

"A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made."

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The learned Judges took the view that every case depends upon its own facts and if the facts justify a conviction for abetment though the person was charged with the commission of the offence itself, there is no bar in law to such conviction. This decision was followed by a subsequent Bench of the same High Court in *Debiprasad Kalowar v. Emperor* (1) where Panckridge J. said:

"It appears to me that this case falls within the provisions of section 236 (Criminal Procedure Code). A conviction of abetment, although it is not charged, is lawful, not by reason of section 238 but by reason of section 237."

A decision of the Allahabad High Court in *Emperor v. Mahabir Prasad* (2) was cited before this Bench but the learned Judges refused to follow that decision which was the decision of a single Judge of the Allahabad High Court. A similar import has been given to the decision in *Begu's* case by the Madras High Court in *Svamo Maha Patro, In re* (3) where Waller J. in dealing with the plea that the accused could not have been lawfully convicted of abetment of murder without a separate charge on it, said:

"It is impossible to accept such a contention in the face of the decision of the Judicial Committee in *Begu v. The King-Emperor* (4)."

No reasons are, however, given.

(1) 59 Cal. 1192 at 1195.

(2) 49 All. 120.

(3) 55 Mad. 903.

(4) 52 I.A. 191.



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With respect, it seems to me that the matter is not covered by section 236 or section 237 of the Code of Criminal Procedure and it also seems to me that the decision in *Begu's case* does not really resolve the difficulty. In *Begu's case* the charge was for murder. The conviction was in respect of an offence under section 201 of the Penal Code for having caused the disappearance of the body of the murdered man. The facts which were conclusively proved in that case were that the appellant removed the body of the murdered man knowing that he had been murdered. On these facts a doubt as to the correct inference to be drawn does arise within the meaning of section 236 of the Code of Criminal Procedure. It may well be that the appellant was party to the commission of the murder and may have been liable to be convicted for murder. On the other hand the appellant may have come to know of the murder only after it had been committed and may have removed the body in order to cause the evidence of the commission of the murder to disappear. No such doubt can possibly exist where a man is charged with dacoity and convicted of the abetment thereof under section 109 of the Penal Code. The offence of dacoity cannot be said to have been committed by any person unless, at the least, he was present and aiding the other members of the gang at the robbery. Abetment, within the meaning of section 109 of the Penal Code, presupposes that the abettor was not present at the commission of the offence by the principal offenders. The decision of the late Chief Court of Lower Burma in *S. P. Ghosh v. King-Emperor* (1) does not

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(1) 8 L.B.R., 274.

help me as, in that case, the Full Bench had to deal with the case of a person who, under section 114 of the Penal Code, was deemed to have committed the offence as a principal offender.

I am not unmindful of the fact that in *A. V. Joseph v. King-Emperor* (1) Baguley J., after a short discussion of the problem, says:

"It is quite clear that a man, who is charged with a substantive offence, and nothing else, can always, without framing a further charge, be convicted of abetment of it."

He finds justification for that view in section 237 of the Code of Criminal Procedure. Three cases are cited by him as authority for the view taken. Two of these, reported in the Indian cases series, are not available here. The case of *Lala Ojha v. Queen-Empress* (2) is really no authority on the point. The appellant there was convicted of an attempt to commit an offence under section 471 of the Penal Code. In appeal it was contended on his behalf that the offence actually established against him was the completed offence and that therefore he was entitled to an acquittal on the ground that the conviction for an attempt could not be converted, in appeal, into a conviction for the completed offence which was established. That contention was rejected, the Appellate Court holding that, as no injustice had been done to the appellant, it should not in view of section 537 of the Code of Criminal Procedure, reverse or interfere with the conviction.

It appears to me that the real solution lies elsewhere. Section 4 (1) (o) of the Code of Criminal Procedure defines an offence as any act or omission

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(1) 3 Ran. 11 at 22—28.

(2) 26 Cal. 863.

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made punishable by any law for the time being in force. Section 109 of the Penal Code lays down that an abettor shall "be punished with the punishment provided for the offence". It does not create a substantive offence. The effect of section 109 of the Penal Code is to make the act of abetment punishable under the substantive provisions creating the offence. Accordingly, when in the charge the appellant here was required to enter upon his defence in respect of the offence under section 395, Penal Code, that charge, at the worst, can be said to be defective to the extent only that it omitted to state that the liability to be punished under section 395, Penal Code, arises by operation of section 109 of the Code. In other words, it seems to me that the most that can be said is that the charge should have stated that the accused committed the offence punishable under section 395 of the Penal Code by operation of section 109 thereof. If this is so, the omission is one curable by section 537 of the Code of Criminal Procedure, unless the omission has in effect occasioned a failure of justice.

It must not be taken by what has preceded to hold that a reference to section 109 of the Penal Code should appear either in the charge or in the judgment. No doubt there is the sanction of long usage behind such reference but it does seem to me at least arguable that even without a reference to section 109 the charge would be in due form. In *Hari Lal v. King-Emperor* (1) a Bench of the Patna High Court held :

"There is in law no distinction between a charge under section 379 of the Penal Code and a charge under that section

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(1) 14 Pat. 225.



read with section 34. The latter section is a mere statement of explanation to be attached to any section which deals with a criminal offence."

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I am very much attracted by the line of reasoning adopted in that case as applied to section 109 of the Penal Code but it is not necessary to pursue the matter further in the present case.

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The appellant in this case was examined under section 342 of the Code of Criminal Procedure and the questions put to him made it clear to him that the prosecution against him was in respect of his acts of planning, engineering and making all arrangements for the commission of the dacoity and for receiving a major share of the loot after the dacoity.

In these circumstances and agreeing as I do with the finding on facts of the trial Court, I refuse to reverse, or interfere with, the conviction passed on the appellant. The sentence appears reasonable and I dismiss the appeal.



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Mills Co., Ltd., created a mortgage by deposit of title deeds in favour of Haji Sattar Haji Vally Mohamed & Sons on 6th September 1934. But this mortgage was not registered by the company or the mortgagee with the Registrar of Joint Stock Companies, as required by s. 109 of the Companies Act. The company created a second mortgage over its properties by a registered deed. At that time he came to know that all mortgages had to be registered with the Registrar of Joint Stock Companies. The company then applied in Civil Miscellaneous No. 166 of 1939 under s. 120 (1) for extension of time to register the mortgage on the ground that the omission to register was accidental or due to inadvertence. In Civil Miscellaneous No. 178 of 1939 three unsecured creditors made an application to wind up the company and before the disposal of the earlier application the company was ordered to be wound up and the Official Liquidator was appointed the Liquidator. He declined to continue the application of the company filed in Civil Miscellaneous No. 166 of 1939. The 1st Mortgage Haji Sattar Haji Vally Mohamed & Sons then made an application to be added or substituted as a petitioner in the case and they pleaded that the firm had never before lent money to any limited company and did not know that all mortgages had to be registered under s. 109 of Companies Act, and that the Managing Director of the United Oil Mills, Ltd., informed him that he was advised by his advocates that registration was necessary and that he was applying to Court for extension of time to effect registration.

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EVIDENCE ACT, s. 24— <i>Confession of accused—"Appears" to court to be inducement, etc.—Something less than proof—Retracted confession—Admissible—Conviction based on retracted confession legal—But prudence should require corroboration. Held: Under s. 24 confession would not be relevant if the making of confession appears to the Court to have been caused by inducement, threat, etc. The phrase "appears to the court" shows that something less than positive proof in the nature of a well-grounded conjecture or probability though not a mere possibility, that the confession is not voluntary, is sufficient. The King v. San Min, [1939] Ran. 97; Khiryo Mandal v. The King, I.L.R. 57 Cal. 649; Emperor v. Panchkowri Dutt, I.L.R. 52 Cal. 67; Emperor v. Nazir and others, I.L.R. 55 All. 91; Hashmat Khan. v. The Crown, I.L.R. 15 Lah. 856, followed. A retracted confession is admissible in evidence. Queen-Empress v. Basvanta, I.L.R. 25 Bom. 168; Queen-Empress v. Raman and others, I.L.R. 21 Mad. 33; Emperor v. Kehri and others, I.L.R. 39 All. 434, followed. The weight to be attached to a retracted confession must depend upon circumstances of each case. There is no law which</i>	

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prevents conviction being based upon an uncorroborated retracted confession but ordinary rule of prudence is that some kind of corroboration is required unless the circumstances are exceptional. *Queen-Empress v. Basvantg*, I.L.R. 25 Bom. 168; *Queen-Empress v. Jadub Das*, I.L.R. 27 Cal. 295; *Queen-Empress v. Maiku Lal and another*, I.L.R. 20 All. 133; *Queen-Empress v. Gharva and others*, R.L.R. 19 Bom. 728, followed.

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at an early stage of a case and his evidence is the first indication of the actual case of a party and the party affected applied for his further cross-examination with reference to entries in books which was refused, his evidence is obviously of less weight than if it had been fully tested.	
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GIFT OF PROPERTY— <i>Gift in presenti—Terms of document of gift and circumstances clear—Oral evidence to show death-bed gift inadmissible—Requisites of death-bed gift among Burman Buddhist—Gift by a sick person—Evidence Act, s. 92.</i> Where the contents of a document clearly show that there was an outright gift <i>in presenti</i> and the circumstances show that the donor was willing to dispose of all his property in terms which were unambiguous oral evidence to show that it was intended to be a death-bed gift or a testamentary disposition is inadmissible as between the parties to the deed. <i>Balkishan Dass v. Legge</i> , 1.L.R. 22 All. 149 (P.C); <i>Maung Kyin v. Ma Shwe La</i> , 1 L.R. 45 Cal. 320 (P.C), referred to. In order to prove a death-bed gift under Burmese Buddhist law it must be shown first that the donor was in fact on his death-bed and secondly that he had no hope of recovery at the time of making the gift. In the absence of such circumstances, there is no rule of law whereby a sick man is prevented from the disposition of every item of his property provided such disposition is to take effect at once. <i>U Tezawuntha v. Maung Zaw Pe</i> , 1.L.R. 10 Ran. 224, referred to.	
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INSOLVENCY—Application against Receiver's act—Extension of time of limitation for sufficient cause—Limitation Act, s. 5—Burma Insolvency Act, ss. 78-81. An application under s. 68 of the Burma Insolvency Act can be admitted after the period of twenty-one days prescribed by the proviso to that section, when the applicant satisfies the Court that he had sufficient cause for not making the application within such period. S. 78 (1) of the Burma Insolvency Act provides, <i>inter alia</i> , that the provisions of s. 5 of the Limitation Act shall apply to applications under the Act, and an application under s. 68 is necessarily an application under that Act. <i>Jhan Bahadur Singh v. The Bailiff, District Court of Toungoo</i> , I.L.R. 5 Ran. 334; <i>K. Lingayya v. Narayana</i> , I.L.R. 41 Mad. 161 (F.B.); <i>Menon v. Secretary of State for India</i> , I.L.R. 34 Mad. 505, distinguished. Where any question of limitation affecting the competence of an appeal arises, the procedure to be adopted should be such as to secure at the stage of admission the final determination of the question, after due notice to all parties and not to leave it for determination at the hearing of the appeal itself. <i>Krishnasami v. Ramasami</i> , I.L.R. 41 Mad. 412 (P.C.), followed.	
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Creditor is wholly irrelevant. An act may be a fraudulent preference although done from most honest motive or the motive with which ordinary people would sympathize. The word "fraudulent" is completely misleading and superfluous in the section. *In re Patrick and Lyon, Ltd.*, (1933) Ch.D., page 790, followed. There is no presumption of fraudulent preference. The onus never shifts from the petitioning creditor. When there is room for more than one explanation, intent to prefer will not be presumed. *Peat v. Gresham Trust*, (1934) A.C. 262 and *Williams on Bankruptcy*, 15th Edn., page 341, followed. If there be a binding agreement, more than three months before the presentation of petition which is specifically enforceable against the Assignee, the transfer will not be a fraudulent preference: *Bulleel and Colmore v. Parker and Bulleel's Trustee*, 32 T.L.R. 661. Fraudulent preference means a discrimination between creditors and not between one evil and another evil to the debtor and a debtor who pays under pressure is not giving preference. Mere abstention to file a suit, does not by itself prove want of pressure. Where a substantial and not a purely illusory sum is paid for transfer it is difficult to make out a case of fraudulent preference, the natural inference being that the property is being sold in ordinary way for the price. The question whether dominant motive of the debtor was to prefer is one of fact. Procedure to be followed in an insolvency case explained.

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INTERNATIONAL LAW—*Hague Regulations*—How far part of Municipal law—Rights and duties of occupant Government—Occupation Courts—Validity of conviction and sentence passed during Japanese occupation—How far binding on Court of legitimate Government on reoccupation—Code of Criminal Procedure, s. 403—Occupation Court whether Court of competent jurisdiction. Six persons including the present respondents were implicated in a dacoity with murder. One of them was conditionally pardoned and became an approver and the other five were tried by a Court of Session during the Japanese occupation. All the accused persons were convicted but on appeal by four to the Supreme Court, two of them were acquitted, and the sentences of the other two were reduced. These convicted persons regained liberty when the Japanese were retreating. After British occupation the respondents were arrested and the Court of Session upheld the plea of *autrefois convict* put forward by the accused. On revision by the Crown : *Held* : International Law has no validity in British Courts, except in so far as its principles are accepted and adopted by the Municipal Law. Hague Regulations will be treated as incorporated into the Municipal Law of Burma in so far as they are not inconsistent with the ordinary law of the country. Occupant Governments have the duty of restoring and maintaining public order and safety by means of the ordinary law of the occupied country. If Courts are constituted according to the Municipal Law of the occupied country, they are validly constituted Courts. If these courts administer the Municipal Law of the occupied country, their decisions are valid and binding on the lawful Government and its Courts. Hague Regulations ; *Wheaton's Elements of International Law*, Vol. II, page 791 ; *Hall's International Law*, Part III, Chapter V, Article 163 ; *McNair Legal Effects of War*, page 321, 322 ; *West Rand Central Gold Mining v. The King*, (1905) 2 K.B. 391, 406 ; *Chung Chi Cheung v. The King*, (1939) A.C. 160, 167, followed. *Held* : The order of the Japanese Commander-in-Chief continued the old Courts and the old law of Burma. The so-called Independent



Government of Burma, having been brought into existence during the War before the conclusion of peace, or the signing of a treaty, had no legal status and new laws passed by them should be regarded as laws passed by the occupying power. *Held further*: Competent Court in s. 403 of Criminal Procedure Code is a Court which has legal authority to decide a case. Legal authority means authority under the laws of Burma. Occupation Courts having been established under the Municipal Law of Burma, their judgments are valid and binding on the lawful Government. The Sessions Court of Tharrawaddy during occupation was a competent Court within the meaning of s. 403 (1) of the Criminal Procedure Code. *Per* DUNKLEY, A.C.J.—The decision regarding the legal status of ordinary Courts during occupation does not imply any decision regarding the status of the Supreme Court or the City Court established by the Japanese administration. *Per* BA U, J.—(*Seemle*) An occupying power while occupation lasts is for all practical purposes the *de facto* Government, and its acts, legislative, executive or judicial, consistent with the terms of Article 43 of the Hague Regulations will be recognized by the legal Government. *Bank of Ethiopia v. National Bank of Egypt and Liguori*, (1937) 1 Ch.D. 513, 522, referred to. *Per* MOOTHAM, J.—S. 403 embodies in statutory form the common law principle that a man may not be put twice in jeopardy for the same offence under the common law.

THE KING *v.* MAUNG HMIN AND THREE ...

INTERPRETATION OF STATUTE—*Alternative interpretation—One leading to smooth working preferred—Ss. 3, 4 and 139, Government of Burma Act, 1935—Governor exercising power outside Burma—If valid—Proclamation under s. 139 published in India in Burma Gazette—If valid and amounts to proclamation—S. 6 (2) of Special Judges Act—If ultra vires—S. 6 (2) if suspends High Court's powers—Governor in enacting the section if interferes with jurisdiction of High Court—Examination of accused on oath under the Criminal Procedure Code as amended before charge whether vitiates conviction—Circumstances when conviction to be set aside for failure to observe rules of procedure—Right of private defence when not available* *Held*: When alternative constructions of a section of a Statute are possible, the alternative which leads to smooth working of the system which the Statute regulates is to be preferred to one which leads to uncertainty friction or confusion. *Shannon Realities v. St. Michel*, (1924) A.C. 185, 192, followed. Proclamation under s. 139 of Government of Burma Act, 1935, issued in *Burma Gazette* published in India where the Governor moved on occupation of the greater portion of Burma by the Japanese, was a sufficient and valid proclamation under the Act. Under ss. 3 and 4 of Government of Burma Act, the power to exercise executive authority vests in Governor and he is entitled to exercise his power even when he is outside Burma. S. 6 (2) of Special Judges Act (Burma Act X of 1943) is not *ultra vires*. Provision in the sub-section that when death sentence is passed the proceedings should be submitted for review to a Judge of the High Court does not involve suspension of the law administered by the High Court. A High Court Judge in reviewing the order of a special judge acts *persona designata*. The vesting in the Governor power to nominate the Judge who will hear such reviews does not involve assumption by the Governor of any power of the High Court within the meaning of the proviso to s. 139 of Government of Burma Act. Special Judges Act does not supersede or abolish the Court of Session, but creates a new class of courts. Examination on oath of accused persons before the framing of



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charge was clearly not in accordance with the Chapter XXI of the Code of Criminal Procedure, as amended by the Burma Act XIII of 1945. But non-compliance of a mandatory rule of procedure does not necessarily render the trial void. If such non-compliance has led to miscarriage or failure of justice, then only the trial will be vitiated otherwise the irregularity will be cured by s. 537 of the Code of Criminal Procedure. <i>King-Emperor v. Nga Po Mñ</i> , I.L.R. 10 Ran. 511, 516, and <i>Emperor v. Erman Ali</i> , I.L.R. 57 Cal. 1228, followed. Right of private defence has been allowed by the law for the purpose of defence only and no man can be allowed to take a vantage of the right to kill with a vengeful motive <i>Po Mye v. The King</i> , [1940] Ran. 109, 117.	
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JURISDICTION OF DISTRICT MAGISTRATES AND SESSIONS JUDGES IN CRIMINAL REVISION— <i>Code of Criminal Procedure</i> , ss. 435 to 438 and 545— <i>May order further inquiry or may report to High Court for orders—Cannot confirm any sentence or pass a judgment</i> . Held: The powers of District Magistrates and Sessions Judges in revision are contained in s. 435 to 438 of the Code of Criminal Procedure, which sections are exhaustive: and they have no other powers. An order under s. 545 of the Code of Criminal Procedure can be made only "when passing a judgment." A District Magistrate or a Sessions Judge cannot pass a judgment in a revision proceeding.	
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LAND ACQUISITION ACT, ss. 23 (1), 26, PART III— <i>Proceedings before District Court—Separate enquiry and award—Dismissal of application illegal—Judgment of Court based on evidence—Material before Collector irrelevant.</i> The proceedings before the District Court under Part III of the Land Acquisition Act are intended to constitute a separate enquiry and must terminate with a specific award by the Court; and a mere dismissal of the application, which is an application to the Collector to make a reference, is not contemplated by the Act. The proceedings before the Court are judicial proceedings and the decision therein must be based on evidence before the Court or admissions made by the parties, and, not on the material before the Collector. The judgment must refer to all the matters mentioned in s 23 (1) of the Act in connection with which complaint is made by the applicant. <i>C.R.M.A. Firm v. Special Collector of Pegu</i> , I.L.R. 8 Ran. 364; <i>MacIntyre v. Secretary of State for India</i> , 2 L.B.R. 208; <i>Shwe Gaung v. The Collector</i> , 4 L.B.R. 71, referred to.	
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OPTION OF RENEWAL ON MUTUAL AGREEMENT IN AN AGREEMENT OF AGENCY— <i>Concluded contract on all terms necessary—Agreement on some points with provision for execution of an agreement, not concluded contract—Distinction between negotiation and contract—Supply of goods in expectation of an agreement not conclusive of existence of agreement.</i> A.K.J. acted as sub-agents of I.B.P. Co Ltd. A.V. was the sole distributor in Moulmein under A.K.J. on an agreement that A.V. will pay A.K.J. an overriding commission of Rs. 15 for each wagon of petrol sold, and that after the expiry of three years, the agreement may be renewed for another two years on terms to "be mutually agreed upon." A.V. alleged that on the 1st June, 1937, an agreement was arrived at and a written contract was to be prepared and signed later, whereas A.K.J. alleged that on the 8th June, 1937 three terms were settled and a written contract would have to be executed later. <i>Held</i> : No oral agreement was arrived at as to all terms upon which the appointment of A.V. was to be continued; neither party intended that the matter should be concluded by oral agreement at all and it was intended that they would enter into an agreement in writing. When written document was to be signed it was found that parties did not agree as to its terms. Thus the parties did not go beyond the stage of negotiation. <i>Held further</i> : The fact that two consignments were supplied after the 1st June, 1937, could not be treated as conclusive of any more than that there was a mutual desire to achieve some continuity and that while negotiations were in progress petrol was supplied on an implied promise to be bound by reasonable terms and that it was clear that it was to everybody's interest that Moulmein should not be without supplies of petrol and the gap during which negotiation took place was bridged by the offer and acceptance of the two consignments.	
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PENAL CODE, s. 84— <i>Burden of proof—Question of sentence. Held</i> : Burden of proving defence of insanity lies upon the accused, not only from the point of view of introducing evidence, but also from the point of view of establishing the defence clearly.	



*Reg. v. McNaughten*, (1843) 4 St. Tr. (N.S. 847), followed. The defence can rely upon anything appearing in the prosecution evidence. *Woolmington v. The Director of Public Prosecutions*, (1935) A.C. 462; *King-Emperor v. U Damapala*, I.L.R. 14 Ran. 666, referred to. Youth, lack of motive and queer behaviour are given due consideration on the question of sentence

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PENAL CODE, MURDER, s. 302—While effecting safe retreat—'In course of dacoity'—'Approver'—Principal witness—Order of Examination—Pardon to approver—When to be tendered—Confession—Of evidence—Confession of co-accused—S. 157, Evidence Act—Statement to Police not admissible as Prosecution evidence—Criminal Courts—Should apply P.C. rulings where applicable—Cross examination—Limits of—If confined to advocate's instructions or personal knowledge. Held: Where murder is committed in the course of effecting a safe retreat, it is committed "in the course of" the dacoity, as the safe retreat was an essential part of the common criminal purpose of the dacoits. *Queen Empress v. Sakthiram Khandar*, 2 Bom. L.R. 325; *Vitti Thevan's Case*, 5 Cr.L.J. 201; *Monoranjan Bhattachariya v. Emperor*, 33 Cr.L.J. 722, approved and followed. Where an approver is examined as the principal witness at a trial, it is desirable that his evidence should be given at the earliest possible opportunity. If proof of guilt of all accused can be proved without the help of the approver's evidence, it would be altogether wrong to pardon a guilty person on condition. *Nga Myo v. The King*, [1938] Ran. 190, followed. A confession is not evidence of the truth of the matters stated therein. Evidence of an approver at the Sessions trial is not confession, but evidence on oath. The confession of a co-accused is not strictly evidence, but it is a statement which may be taken into consideration under section 30, Evidence Act. Statement to the Police made in the course of their investigation should not be put in to help the prosecution as if they were admissible (which they are not) under s. 157, Evidence Act. A document which the accused or his advocate has a right to inspect does not become evidence from the mere fact of inspection. Care should be taken in all criminal cases to apply, where necessary, rulings of the Privy Council. Persons in custody may point out objects to a magistrate or searcher, but the statements which accompany the discovery of such objects are not admissible in evidence. *Pahala Narayan Swami v. King-Emperor*, 18 Pat. 234; *Ramdayal Mangilal v. The King*, [1941] Ran. 789, followed. In cross examination, an advocate can put questions remote from his instructions or from personal knowledge. Scope and limit of cross-examination explained.

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PENAL CODE, s. 395—Abettor convicted of principal offence—S. 109, Penal Code not mentioned in charge—Validity of conviction—S. 537, Cr.P.C.—Curable under—No failure of justice—Prosecution Case put under s. 342, Cr.P.C. The appellant arranged for dacoity, got together the dacoits, sent them but did not accompany them. The dacoity was committed as planned and appellant received major share of the loot. The trial Court convicted him under s. 395, Penal Code. Held: Though the charge did not mention s. 109, Penal Code, the appellant was liable to be

punished as a principal offender, by operation of that s. and the omission of section 109 is curable by s. 537, Cr.P.C. especially as the whole prosecution case was put to him in his examination under s. 542, Cr.P.C. *Queen v. Chand Nur*, (1874) 11 Bom. H.C. 24; *Singaravelu Pillay v. Emperor*, 14 I.C. 203; *Khumman v. King-Emperor*, 7 Luck. 102 at 108; *Bhikhari Singh v. King-Emperor*, 13 Pat. 730; *Inanadacharan Ghatak v. Emperor*, 57 C. 307; *Begu v. King-Emperor*, 52 I.A. 191; *Debi Prasad Kalowar v. Emperor*, 59 Cal. 1192 at 1195; *Emperor v. Mahabir Prasad*, 49 All. 120; *Syamo Maha Patro, In re*, 55 Mad. 903; *S.P. Ghosh v. King-Emperor*, 8 L.B.R. 274; *A.V. Joseph v. King-Emperor*, 3 Ran. 11 at 22-28; *Lala Ojha v. Queen-Empress*, 26 Cal. 863; *Hari Lal v. King-Emperor*, 14 Pat. 225, considered.

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PENAL CODE, s. 409—*Authorized dealer selling goods to unauthorized purchaser. Held: It is not criminal breach of trust for an authorized dealer to sell the goods to an unauthorized purchaser even though he was only entitled to sell those goods to persons who were duly authorized to buy them, as the goods obtained from the officer-in-charge of the Distributing Point were his property.*

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PENAL CODE, s. 412—*Requisites—Dacoity—Five persons acting in concert—Statement that a shawl was "brought at the instance of police"—If admissible under s. 60 of the Evidence Act—Possession of stolen property—No presumption in absence of guilty knowledge or recent possession. A person can be convicted under s. 412, Penal Code if he receives stolen articles from a person having reason to believe him to belong to a gang of dacoits or knew or had reason to believe that possession of the article had been transferred by dacoity. The offence of dacoity requires at least five persons acting in concert and in the absence of evidence to that effect, cannot be presumed. A headman's evidence that a shawl (whose possession had been alleged to be transferred as a result of dacoity) was brought to him "at the instance of the police" is inadmissible under s. 60 of the Evidence Act. The police officer who found the article is the proper witness to speak to such finding. Unless there is some evidence of guilty knowledge or recent possession of stolen property no presumption can be made against the possessor.*

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one executor against his co-executor and to order both the executors to furnish an administration bond. <i>Giribala Dassi v. Haldar</i> , I.L.R. 31 Cal. 688, referred to.	
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REGISTRATION ACT, SS. 32, 33, 34, 35, 52, 58, 59 AND 60—Rule 96 of Registration Rules—Procedure relating to registration—Power of attorney executed before and authenticated by an officer who holds a dual office of a Magistrate and a Sub-Registrar. Held: If there is a defect in the procedure relating to the registration of a document, it is not fatal to the validity of the document. <i>Jambu Prasad v. Muhammad Aftab Ali Khan</i> , 37 All. 49; <i>Sitaram Lazmanrao Kadam v. Dharmasukhram Tanrulkham Tripathi</i> , 51 Bom. 971; <i>Sateendranath Chaudhuri v. Jateendranath Chaudhuri</i> , 63 Cal. 1 and <i>Mul Raj v. Rahim Bakish</i> , 20 L. 255, followed. Held: A power of attorney executed before and authenticated by an officer who holds a dual office of a Magistrate and a Sub-Registrar is a valid power-of-attorney even if that officer signs and authenticates the power inadvertently as a Magistrate and not as a Sub-Registrar; and consequently a mortgage deed executed by that agent under that power-of-attorney and duly registered is valid. <i>Sah Mukhun Lal Panday v. Sah Koondun Lal</i> , 15 B.L.R. 288, followed.	
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RIGHT OF PRIVATE DEFENCE—S. 97 of Penal Code—Plea not raised by accused—Court should take notice if evidence warrants—Reasonable apprehension of danger to life—Accused justified in killing the assailant. Held: Even though the right of private defence under s. 97 of Penal Code be not pleaded or suggested by the accused, yet the matter should be considered or be put before the jury, by the Court for consideration and a verdict of not guilty may be properly given. <i>The King v. Upendra Nath Das</i> , 19 C.W.N. 653 (F.B.), followed. Held: In exercising the right of private defence, a person is not obliged to modulate his defence step by step or to retreat; he is entitled to secure his victory till he finds himself out of danger. Where assault assumes dangerous form, every allowance should be made for one who for self-preservation goes a little further than a perfectly cool bystander would. The point for consideration is whether there was a reasonable apprehension of danger to life. <i>Alingal Kuntunayan and another v. King-Emperor</i> , 1 L.R. 28 Mad. 464; <i>Bhut Nath Dave v. King-Emperor</i> , 13 C.W.N. 1180; <i>Radhey and others v. King-Emperor</i> , 24 Cr. L.J. 735, followed. When the accused ran away and was pursued by the deceased with a dagger in hand, and when he could not run further turned round, embraced the deceased and gave three stabs in the back and as a result of one of the stabs, the deceased died, the accused could not be said to have exceeded his right of private defence.	
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